02 No. 5661

ORIGINAL

Supreme Court, U.S.
FILED
NOV 2 2002
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IN THE SUPREME COURT OF THE UNITED STATES

**DR. CHARLES THOMAS SELL, D.D.S.**
**Petitioner,**

**v.**

**THE UNITED STATES OF AMERICA**
**Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether the government can violate an innocent individual's fundamental right to bodily integrity by injecting him with permanently mind-altering psychotropic drugs against his will solely because it believes there is a chance to medicate the individual into drug-induced "competence" for trial?

2. Whether the government's effort to forcibly medicate an innocent person, solely for the purpose of attempting to make him "competent" to stand trial, is reviewed under a strict scrutiny standard or under one of the lower standards, which standards are both recited in the conflicting lower court and appellate court decisions on this issue?

3. Whether the government should at least be required to prove, by clear and convincing evidence, each element of the strict scrutiny test before it violates an individual's right to be free from the forced injection of mind-altering medication?

4. Whether the district court must consider the effects of forcible medication on a defendant's Sixth Amendment trial rights before the government is allowed to permanently alter an individual's psychological chemistry?



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## OPINIONS BELOW

The court of appeals' opinion is reported at United States v. Sell, 282 F.3d 560 (8th Cir. 2002) and is reproduced in the appendix hereto at pages 1 through 12. The magistrate judge's opinion, which was not published, is reproduced in the appendix hereto at pages 13 through 28. The district court's opinion is not reported and is reproduced in the appendix hereto at pages 29 through 46. The court of appeals' denial of the petition for rehearing is provided herewith on page 47 of the appendix.



## JURISDICTION

A divided panel of the court of appeals entered its judgment on March 7, 2002. By a vote of 5-4, the petition for rehearing and petition for rehearing en banc were denied on May 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitutional Provisions.**

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.

U.S. Const. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Statutory Provisions.**

18 U.S.C. § 4241(d):

> (d) Determination and Disposition. - If . . . the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his own defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility --
>
> > (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
> >
> > (2) for an additional reasonable period of time until --



> > > (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
> > >
> > > (B) the pending charges against him are disposed of according to law;
> > >
> > > whichever is earlier.
>
> If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

## STATEMENT OF THE CASE

On May 7, 2002, in a five-to-four split vote, the United States Court of Appeals denied Dr. Charles Thomas Sell's ("Dr. Sell") petition for rehearing en banc. On March 7, 2002, two judges on the three-judge panel affirmed the District Court's opinion, over the vigorous dissent of the Honorable Judge Bye. The District Court opinion, issued on April 4, 2001, allowed the forcible medication of Dr. Sell solely based upon the government's desire to drug Dr. Sell into "competence" to stand trial. The District Court denied Dr. Sell's motion to reconsider the Magistrate Judge's August 9, 2000 Report and Recommendation, also condoning Dr. Sell's forced medication.

Dr. Sell is an intelligent, educated individual with advanced medical and dental training who opposes being involuntarily medicated with ineffective and potentially life-threatening medications. (Record on Appeal ("ROA") at 1099, 1108, 1137, 1120, 1121, 1136, 589, 617). At 53, Dr. Sell is a non-dangerous, unconvicted, pretrial detainee confined in the United States Medical Center for Federal Prisoners (the "Center") in Springfield, Missouri. (ROA at 1108). He has been held at the Center without treatment or trial for more than three and one half years, often under particularly difficult circumstances, and has been held in other facilities, including the Center, for more than four years without trial. (ROA at 551, 547, 559, 730-746, 1001-09). He is accused of insurance fraud.[1]

Prior to being indicted, Dr. Sell maintained a dental practice in St. Louis County, Missouri. (ROA 1108, 1099). He was married and has four children. (ROA at 1087, 1091, 1114). In addition, Dr. Sell served for almost two decades, with distinction, as an

[1]While there are other charges pending, the charges of insurance fraud were the sole basis for the Eighth Circuit's decision regarding involuntary medication. See Appendix at 7, n.8.



officer in the United States Army Dental Reserve, ultimately attaining the rank of Major. (ROA at 1085, 1142-59, 1161-74, 1177).

On July 30, 1997, after an undercover investigation involving government witnesses (with very questionable pasts and motives), Dr. Sell was indicted for Medicaid and insurance fraud for allegedly submitting false invoices to insurers for the purpose of obtaining payment for dental services that were not covered by the policies and program in violation of 18 U.S.C. § 1341, 42 U.S.C. § 1320a-7b(a)(1)(i), and 18 U.S.C. § 1957(a). (Cause No. 4:97CR00290-DJS). Dr. Sell denies the charges.

On October 14, 1998, after exploration of Dr. Sell's history of mental illness, counsel for Dr. Sell filed a notice of intent to introduce evidence of a mental disease or defect, which resulted in the Magistrate Judge ordering a psychological assessment of Dr. Sell. (ROA at 285-86, 293-317).

Ultimately, as a result of the psychological assessment, the District Court found Dr. Sell incompetent to stand trial because Dr. Sell "suffer[ed] from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him and to assist properly in his defense." (ROA at 341-43). Pursuant to 18 U.S.C. §4241(c), the court committed Dr. Sell to the custody of the United States Attorney General for a reasonable period of time "not to exceed four months." (ROA at 341). The Department of Justice then committed Dr. Sell to the custody of the Center, where he has been confined for over three and one half years, without treatment, often without a valid order of commitment. (See, e.g., ROA at 730-46, 1001-09, 551, 547, 559).

In 1999, only two weeks after Dr. Sell was committed, the Center sought to forcibly drug Dr. Sell with antipsychotic medications to restore him to competency for the sole purpose of bringing him to trial. (See, e.g., ROA at 347-50) (motion for appointed counsel to attend administrative proceeding). Dr. Sell opposes the medication because he has previously been treated with an antipsychotic drug and found the side effects to be intolerable. (ROA at 589, 617). In addition, because of his medical and dental training, Dr. Sell understands that antipsychotic medications are potent, mind-altering drugs with the potential for severe, irreversible side effects. (ROA at 556).

On April 4, 2001, two and one half years after Dr. Sell filed his notice of intent to introduce evidence of mental disease or defect, and after protracted delays in proceedings before the Magistrate Judge and the District Court, the District Court held that Dr. Sell was not dangerous, but that the Government's interest in restoring Dr. Sell to competency to stand trial was alone sufficient to warrant forcible medication. (April 4, 2001 Order at App. 37-46).

Dr. Sell appealed to the United States Court of Appeals for the Eighth Circuit and, on March 7, 2002, a divided Panel affirmed the decision of the District Court and held that, although not dangerous, Dr. Sell may be involuntarily medicated with antipsychotic drugs for the sole purpose of rendering him competent to stand trial. Dr. Sell's petition for rehearing by the Eighth Circuit en banc was denied 5-4.



## REASONS FOR GRANTING THE PETITION

Dr. Sell remains an innocent man - he has never been convicted of any crime - and the government has wrongfully imprisoned him for over four years without a trial. Even though Dr. Sell poses no demonstrated risk of harm to himself or others, the government seeks to violate his First, Fifth, Sixth, and Ninth Amendment rights by injecting him with permanently mind-altering psychotropic drugs against his will. The government wants to medicate Dr. Sell into an artificially induced, drug-dependent competence so that the government can bring him to trial on charges involving alleged economic crimes of fraud and money laundering. If the Eighth Circuit Court of Appeals' decision is allowed to stand, a mentally incompetent individual will lose his right to refuse medication based solely on the government's unproven assertion that the individual is guilty of a non-violent crime.

The petition should be granted to determine whether an individual has a fundamental right to refuse the government's attempts to forcibly medicate him. Although this Court has ruled that the right to resist forced administration of psychotropic drugs is substantial, it has never considered whether this right is fundamental as a matter of substantive Constitutional law. This Court has repeatedly reiterated, however, that an individual has fundamental rights in the self-determination over one's body. Dr. Sell's interest in avoiding the permanent alteration of his brain chemistry and muscular control is as least as important as the rights previously recognized as fundamental.

In addition, the petition should be granted to ensure that the decision of the Eighth Circuit to narrow the fundamental liberty interest in self-determination of medical issues does not adversely affect or overrule, sub silentio, existing law relating to the control of

medical decisions about pregnant women and those opposing certain medical treatment on religious grounds.

The petition should also be granted to determine whether the government can violate a person's Constitutional rights for a purely prosecutorial motive. In the past, the Court has refused to allow the government to violate an individual's right to bodily integrity when its only motive was a prosecutorial one. In fact, the Constitution only sanctions intrusion upon the right to bodily integrity when the life or health of the individual or others is at risk. A citizen does not lose a fundamental, Constitutional right simply based on the fact that he is charged with a crime.

Importantly, unlike the Court's prior decisions regarding forcible medication, this case does not involve questions of prison administration or prison safety. Rather, this case presents the narrow question of whether an innocent individual loses his right to refuse psychiatric medication simply because the government has chosen to charge that individual with a crime. Constitutionally, the answer to this question must be no.

The petition should also be granted, and a decision by this Court is necessary, to resolve the divergent opinions in the lower federal courts and state courts regarding the standard of scrutiny and burden of proof to be applied to the government's efforts to forcibly medicate an individual solely for the purpose of making the individual competent to stand trial. About ten years ago, in Riggins v. Nevada, 504 U.S. 127 (1992), this Court specifically declined to prescribe the substantive standards concerning forced medication of a pretrial detainee, based on the insufficient record before it. Id. at 136. The Riggins Court also did not determine the government's burden of proof to establish that forcible



medication is proper. This case presents an opportunity to address the important Constitutional issues left open by Riggins.

In addressing the issues presented herein, this Court should also confirm a detainee's right to a Sixth Amendment pretrial inquiry to determine whether the forced medication would affect the detainee's jury trial rights.

## APPENDIX

1. United States v. Sell, 282 F.3d 560 (8th Cir. 2002)

2. August 9, 2000 Memorandum and Order of United States Magistrate Judge

3. April 4, 2001 Order of United States District Court

4. May 7, 2002 Order Denying Petition for Rehearing and for Rehearing En Banc





United States Court of Appeals,
Eighth Circuit.

**UNITED STATES of America, Appellee,**
**v.**
**Charles Thomas SELL, Appellant,**
**Association of American Physicians & Surgeons, Inc. Amicus on Behalf of Appellant.**

**No. 01-1862.**

Submitted: Oct. 15, 2001.
Filed: March 7, 2002.
Rehearing and Rehearing En Banc Denied May 7, 2002. [FN*]

FN* Judges Loken, Murphy, Bye, and Riley would grant the petition for rehearing en banc. Judge McMillian took no part in the consideration of this case.

Defendant, a physician was indicted for health care fraud, attempted murder, conspiracy, and solicitation to commit violence. After a hearing, the United States District Court for the Eastern District of Missouri, Donald J. Stohr, J., reversed magistrate's finding that defendant posed danger to himself and others, but affirmed holding that forcible medication to restore defendant to competency was warranted. Defendant appealed. The Court of Appeals, Heaney, Circuit Judge, held that: (1) defendant did not pose a danger to himself or others; (2) as a matter of first impression, government could, subject to limitations, forcibly administer antipsychotic medication for sole purpose of rendering pre-trial detainee competent to stand trial; (3) government's interest in restoring defendant's competency so he could be brought to trial was paramount; (4) no less intrusive means of restoring defendant's competency were available; (5) antipsychotic medication was medically appropriate; and (6) district court properly considered defendant's Sixth Amendment right to a fair trial.

Affirmed.

Bye, Circuit Judge, filed dissenting opinion.

West Headnotes

**[1] Mental Health ⇐432**
257Ak432

Defendant, who was subject of hearing as to whether he was competent to stand trial, did not pose a danger to himself or others; defendant's inappropriate behavior in psychiatric facility amounted at most to an inappropriate familiarity and even infatuation with a nurse.

**[2] Criminal Law ⇐1158(1)**
110k1158(1)

Court of Appeals reviews district court's determination of questions of fact under the clearly erroneous standard.

**[3] Mental Health ⇐436.1**
257Ak436.1

Pre-trial detainee could, subject to limitations, be forcibly administered antipsychotic medication for sole purpose of rendering him competent to stand trial, even though detainee had a liberty interest, under Due Process Clause, in avoiding unwanted antipsychotic medication; charges against defendant were serious, such that government had essential state interest in bringing detainee to trial that sufficiently outweighed detainee's interest in refusing medication, no less intrusive means of restoring detainee's competency existed, and antipsychotic medication was medically appropriate for detainee's condition, in that medication could reasonably be expected to minimize detainee's delusions and render him competent to stand trial, and side-effects could be minimized. U.S.C.A. Const.Amend. 14.

**[4] Mental Health ⇐436.1**
257Ak436.1

In order to forcibly medicate an individual, for purpose of rendering him competent to stand trial, government must (1) present an essential state interest that outweighs the individual's interest in remaining free from medication, (2) prove that there is no less intrusive way of fulfilling its essential interest, and (3) prove by clear and convincing evidence that the medication is medically appropriate. U.S.C.A. Const.Amend. 14.

**[5] Mental Health ⇐436.1**
257Ak436.1

Medication is medically appropriate, for purpose of rendering a pre-trial detainee competent to stand trial, if (1) it is likely to render the patient competent, (2) the likelihood and gravity of side effects do not overwhelm its benefits, and (3) it is in the best

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medical interests of the patient.

**[6] Criminal Law ⇐1139**
110k1139

Question of whether district court erred by holding that government's interest in bringing detainee to trial was sufficient to outweigh detainee's interest in refusing medication presented a mixed question of law and fact, such that Court of Appeals reviewed district court's finding de novo.

**[7] Mental Health ⇐436.1**
257Ak436.1

Government has an essential interest in bringing a defendant to trial, but not all charges are sufficient to justify forcible medication of a defendant; rather, charges must be serious.

**[8] Mental Health ⇐436.1**
257Ak436.1

For purpose of justifying forcible medication so as to render detainee competent to stand trial, despite his liberty interest in refusing antipsychotic medication, 62 charges of fraud and one charge of money-laundering were sufficiently serious to constitute a paramount government interest. U.S.C.A. Const.Amend. 14.

**[9] Mental Health ⇐436.1**
257Ak436.1

No less intrusive means existed by which government could achieve its essential interest in rendering detainee competent to stand trial, as required for forcible medication of detainee with antipsychotic medication; two treating physicians testified that medication was most effective treatment for delusional disorder, and the only way detainee would be restored to competency.

**[10] Mental Health ⇐432**
257Ak432

The government may not constitutionally bring an incompetent defendant to trial.

**[11] Mental Health ⇐436.1**
257Ak436.1

Antipsychotic medication was medically appropriate for pre-trial detainee who was incompetent to stand trial; medication could reasonably be expected to minimize detainee's delusions and render him competent for trial, side-effects of medication could be minimized, and medication was in detainee's medical interest, in that his delusions interfered with his ability to make sound judgments about his life and his treatment, and his disorder impaired his interpretation of reality and his reasoning.

**[12] Mental Health ⇐436.1**
257Ak436.1

District court properly considered defendant's Sixth Amendment right to a fair trial when it ordered forcible administration of antipsychotic medication, where court determined that defendant would be able to participate meaningfully in his trial while under influence of the medication, and that medication would enable defendant to communicate with his counsel in a rational manner, and court indicated willingness to reexamine Sixth Amendment claim after medication regimen had begun, when effects of medication on defendant's competency and demeanor could properly be evaluated. U.S.C.A. Const.Amend. 6.

***562** Lee T. Lawless, St. Louis, Missouri, argued, for appellant.

Dorothy L. McMurtry, Assistant U.S. Attorney, St. Louis, Missouri, argued (Raymond W. Gruender and Howard J. Marcus, on the brief), for appellee.

Before BOWMAN, HEANEY and BYE, Circuit Judges.

HEANEY, Circuit Judge.

Appellant Dr. Charles Sell, D.D.S. is charged with health care fraud, attempted murder, conspiracy, and solicitation to commit violence. In this appeal, Sell challenges the district court's [FN1] determination that he may be involuntarily medicated with antipsychotic drugs for the sole purpose of rendering him competent for trial. We affirm.

FN1. The Honorable Donald J. Stohr, United States District Court for the Eastern District of Missouri.

I. Background

On May 16, 1997, Sell was charged in a federal criminal complaint with making false representations in connection with payments for health care services

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in violation of 18 U.S.C. § 1035(a)(2). The government alleged that Sell and his wife submitted false claims to Medicaid and private insurance companies for dental services not provided, including false documentation and bogus x-rays in support of these claims. On May 20, 1997, the government filed a motion for psychiatric examination of Sell to determine his competence to stand trial. [FN2] On May 20, 1997, a magistrate judge ordered that Sell be sent to the U.S. Medical Center for Federal Prisoners at Springfield, Missouri ("Springfield") for an evaluation. On July 15, 1997, after receiving a psychiatric evaluation from Springfield, the district court held that Sell was competent to stand trial. The report, which was accepted without objection, stated that Sell was currently competent to stand trial but that there was a possibility that he would develop a psychotic ***563** episode in the future. On July 30, 1997, an indictment was returned against Sell and his wife, charging them with fifty-six counts of mail fraud, six counts of medicaid fraud, and one count of money-laundering.

FN2. Sell has a history of mental illness.

In August 1997, Sell was released on bond. On January 22, 1998, the government filed a bond revocation petition alleging that Sell had violated the conditions of his release by attempting to intimidate a witness. A warrant was issued for Sell's arrest and he was brought before a magistrate judge for an initial appearance. Sell's behavior at this appearance was out of control. He screamed, shouted, and used racial epithets. Nonetheless, the judge tried to proceed, but when she advised Sell of his rights, he leaned towards her and spit directly in her face.

On January 26, 1998, a bond revocation hearing was held, and shortly thereafter, the court ordered that Sell's bond be revoked and that he be detained. At this hearing, the court received evidence that Sell's mental condition was deteriorating. Sell was not sleeping at night because he expected the FBI to barge into his house. A psychiatrist reported that Sell soon could become a danger to himself and others.

On April 23, 1998, Sell was charged in a second indictment with conspiring and attempting to kill a witness and an FBI agent. The government contends that Sell and his wife asked a hit man to plot the murder of a former employee at his dental office who planned to testify against him on the fraud charges. The government also alleges that Sell plotted to kill the African-American FBI agent who had arrested him. The two indictments were joined.

During the next several months, the trial date was continued on a number of occasions at the request of both parties. On February 9, 1999, Sell's counsel filed a motion asking this court to hold a hearing to determine Sell's competency. The government filed a separate motion to have a government psychologist examine Sell. Both Sell's psychologist and the government psychologist diagnosed Sell with delusional disorder, persecutory type. [FN3]

FN3. Delusional disorder is characterized by the presence of one or more non-bizarre delusions that persist for at least one month. *Diagnostic and Statistical Manual of Mental Disorders IV* at 296. The delusions are generally plausible ideas that can conceivably occur in real life. *Id.* The persecutory subtype of delusional disorder is characterized by a person's belief that he is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long term goals. *Id.* at 298.

On April 14, 1999, the district court held a hearing on Sell's competency. Upon consideration of the evidence, the court found that Sell was suffering from a mental disease or defect rendering him incompetent to assist properly in his defense, and thus incompetent to stand trial. The court ordered that Sell be hospitalized at Springfield for a reasonable period of time not to exceed four months to determine whether there was a substantial probability that Sell would attain the capacity to stand trial.

At Springfield, Sell was under the care of two clinicians, Dr. DeMier, the clinical psychiatrist, and Dr. Wolfson, the consulting psychiatrist. Both Dr. DeMier and Dr. Wolfson determined that Sell was in need of antipsychotic medication. [FN4] On ***564** June 9, 1999, an administrative hearing was held before a medical hearing officer. Dr. DeMier and Dr. Wolfson testified in favor of using antipsychotic medication in the treatment of Sell, and testified that it was the only way he could be restored to competency. Sell proffered the affidavit of his psychiatrist, Dr. Cloninger, who asserted that he did not think Sell would respond well to medication. Cloninger Aff. ¶¶ 8, 17. Sell also called a number of witnesses and testified that he did not want to take antipsychotic medication and have his chemistry

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altered. The medical hearing officer concluded that antipsychotic medication was the treatment of choice. This finding was based on the fact that his delusional thinking could make him dangerous and that no other drug could treat his delusional symptoms. Dr. Sell filed an administrative appeal that was denied. The Medical Center delayed the administration of the medication to give Sell the opportunity to seek review by the district court.

FN4. Justice Kennedy described antipsychotic medications in his concurring opinion in *Riggins v. Nevada*:

First introduced in the 1950's, antipsychotic drugs ... have wide acceptance in the psychiatric community as an effective treatment for psychotic thought disorders. *See American Psychiatric Press Textbook of Psychiatry* 770-774 (J. Talbott, R. Hales, & S. Yodofsky eds. 1988 (*Textbook of Psychiatry* )); Brief for American Psychiatric Association as Amicus Curiae 6-7. The medications restore normal thought processes by clearing hallucinations and delusions. *Textbook of Psychiatry* at 744.

*Riggins v. Nevada*, 504 U.S. 127, 141, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring). In *Washington v. Harper*, the Supreme Court discussed the side effects associated with antipsychotic medications:

The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. (Citation omitted). While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. See Finding of Fact 9, App. to Pet. for Cert. B-7; Brief for American Psychological Association as Amicus Curiae 6-9. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. See *Mills*, 457 U.S., at 293, n. 1, 102 S.Ct., at 2445, n. 1. The State, respondent, and amici sharply disagree about the frequency with which tardive dyskinesia occurs, its severity, and the medical profession's ability to treat, arrest, or reverse the condition. A fair reading of the evidence, however, suggests that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe. Brief for American Psychiatric Association et al. as Amici Curiae 14-16, and n. 12; see also Brief for American Psychological Association as Amicus Curiae 8.

*Washington v. Harper*, 494 U.S. 210, 229-30, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

On September 29, 1999, a United States Magistrate Judge conducted a full judicial hearing. At that hearing, the Government called two witnesses, Dr. DeMier and Dr. Wolfson. They testified that Sell was in need of antipsychotic medication, that his condition would continue to deteriorate without it, that his behavior could be dangerous, and that antipsychotic medication was likely to restore him to competency. On August 9, 2000, the magistrate entered an order finding that Sell posed a danger to himself and others. *United States v. Sell*, No. 4: 98CR177, (E.D.Mo. Aug. 9, 2000) (order granting government's motion to involuntarily medicate defendant). Based on this finding, the magistrate authorized ***565** the government to forcibly medicate Sell with antipsychotic medication.

In April 2001, the district court reversed the magistrate's finding that Sell posed a danger to himself and others, noting that the evidence in the record was insufficient to support such a finding. Despite this reversal, the district court affirmed the magistrate's order, holding that the Government's interest in restoring Sell to competency so that he can stand trial was alone sufficient to warrant forcible medication.

Sell appeals this decision and asks this court to decide whether the district court erred in holding that he could be forcibly injected with antipsychotic drugs for the sole purpose of restoring his competency to stand trial. Sell also asks us to examine whether: (1)

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the district court applied the correct standard of review; (2) whether the district court properly considered his Sixth Amendment right to a fair trial, and (3) whether the government has proven by clear and convincing evidence that the medication is medically appropriate and that the medication has a reasonable probability of restoring his competency. The Government argues that the district court did not err on these grounds. It further argues that the district court's finding that Sell was not dangerous was erroneous and that Sell's dangerousness provides an alternate ground for affirmance in this case.

## II. Discussion

### A. Sell's Dangerousness to Himself and Others.

[1][2] First, we consider the government's claim that the district court erred in overturning the magistrate's determination that Sell is dangerous. We review the district court's determination of questions of fact under the clearly erroneous standard. *See United States v. Kissinger*, 986 F.2d 1244, 1246 (8th Cir.1993). The government argues that the district court did not give adequate weight to Sell's *potential* to be a danger to himself or others. The district court noted, however, that Sell's inappropriate behavior at Springfield amounted at most to an "inappropriate familiarity and even infatuation" with a nurse. Upon review, we agree that the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center. The district court properly reversed the magistrate's finding.

### B. Forcible Administration of Antipsychotic Drugs to Restore Competency

Next, we consider the question of whether the district court erred in holding that a pretrial detainee may be forcibly injected with antipsychotic medication for the sole purpose of rendering him competent to stand trial. This is an issue of first impression for this court. *Cf. Papantony v. Hedrick*, 215 F.3d 863, 865 (8th Cir.2000) (holding that in the context of a *Bivens* action, there is no clearly established right of a pre-trial detainee not to be forcibly administered antipsychotic drugs for the sole purpose of rendering him competent for trial). In *Washington v. Harper*, the Supreme Court recognized that individuals possess "a significant liberty interest in avoiding unwanted administration of antipsychotic drugs." 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); *cf. United States v. Weston*, 255 F.3d 873, 876 (D.C.Cir.2001) (citations omitted) ("The due process liberty interest in avoiding unwanted antipsychotic medication may be 'significant,' but it is not absolute."). In *Harper*, a convicted prison inmate claimed that the State of Washington violated his due process rights by administering antipsychotic drugs against his will. 494 U.S. at 217, 110 S.Ct. 1028. The Court acknowledged that Harper had a liberty interest ***566** in avoiding unwanted medication but held that the "Due Process Clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if [the inmate] is dangerous to himself or others and the treatment is in [the inmate's] medical interest." *Id.* at 211, 110 S.Ct. 1028.

In *Riggins v. Nevada*, the Court applied its *Harper* analysis to the issue of whether a pre-trial detainee may be forcibly injected with antipsychotic medication for the purpose of rendering him competent for trial. 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). In *Riggins*, a pre-trial detainee was forcibly administered the antipsychotic drug Mellaril after a Nevada district court denied the detainee's pre-trial motion to terminate the medication with a one-page order that gave no indication as to the court's rationale. *See id.* at 130-31, 112 S.Ct. 1810. A jury convicted Riggins, [FN5] and he appealed, arguing that the forced administration of Mellaril denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance and demeanor at trial. *See id.* at 131, 112 S.Ct. 1810. Riggins further argued that the prejudice was not justified because the state did not demonstrate a need to administer the drug, nor did it explore alternative treatments. The Supreme Court agreed, and held that Riggins's Fourteenth Amendment rights had been violated because the Nevada court did not acknowledge the detainee's liberty interest in freedom from unwanted medication, make any findings on the need for forced medication, and make findings on reasonable alternatives to antipsychotic medication. *See id.* at 136-37, 112 S.Ct. 1810. The Court also noted that forcible administration of antipsychotic drugs may have interfered with Riggins's Sixth Amendment right to a fair trial. *See id.* The Court, therefore, reversed and remanded the case.

FN5. At trial, Riggins unsuccessfully presented an insanity defense and was convicted of murder and sentenced to death.

The Supreme Court did not have the opportunity to determine when involuntary medication could be used on a pre-trial detainee because the Nevada court

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offered the accused almost no protection against involuntary medication. The Supreme Court did note, however, that:

> Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment guarantees at least as much protection to persons the state detains for trial. (Citation omitted).
>
> ... Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the district court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. (Citation omitted). Similarly, the state might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means.

*Id.* at 135, 112 S.Ct. 1810.

Based on this language, we conclude that subject to the limitations outlined below, the government may forcibly administer antipsychotic medication for the sole purpose of rendering a pre-trial detainee competent to stand trial without violating the accused's due process rights.

***567** C. The Standard of Review for Forcible Administration of Antipsychotic Drugs.

[3][4][5] We now consider Sell's claim that the district court employed the wrong standard of review to determine whether forced administration of medication is appropriate in this case. Sell encourages us to adopt strict scrutiny, but the Supreme Court declined to adopt such a standard in *Riggins*. *See Riggins*, 504 U.S. at 136, 112 S.Ct. 1810. [FN6] Based on the Supreme Court's decisions in *Riggins* and *Harper*, and the decisions of our sister courts, [FN7] we hold that the government must meet the following test in order for the government to forcibly medicate an individual. First, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication. *See Riggins*, 504 U.S. at 135, 112 S.Ct. 1810 (noting that the government must prove an overriding state interest). Second, the government must prove that there is no less intrusive way of fulfilling its essential interest. *See id.* Third, the government must prove by clear and convincing evidence that the medication is medically appropriate. *See id.* Medication is medically appropriate if: (1) it is likely to render the patient competent, *see Weston*, 255 F.3d at 876; (2) the likelihood and gravity of side effects do not overwhelm its benefits, *see id.*; and (3) it is in the best medical interests of the patient. *See Harper*, 494 U.S. at 227, 110 S.Ct. 1028 (noting that the court should consider the petitioner's medical interest). The district court did not explicitly apply this test, so ***568** we review the district court in light of the standards we have set forth.

> FN6. The court stated: "We have no occasion to finally prescribe such substantive standards ... since the District Court allowed administration of Mellaril to continue without making any findings about reasonable alternatives." *Riggins*, 504 U.S. at 136, 112 S.Ct. 1810.
>
> FN7. Other courts have come to contradictory conclusions on what substantive standards are necessary to satisfy a pretrial detainee's due process rights. The Sixth Circuit held that courts must apply the strict scrutiny standard when the state wishes to forcibly medicate a non-dangerous pre-trial detainee. *See United States v. Brandon*, 158 F.3d 947, 960 (6th Cir.1998). The D.C. Circuit interpreted *Riggins* to require "heightened scrutiny" that takes into consideration the severity of infringement that antipsychotic drugs impose on an individual's liberty interest, the need to find an essential state policy that provides an overriding justification for forced medication, and a requirement to consider less intrusive alternatives. *See United States v. Weston*, 255 F.3d 873, 880 (D.C.Cir.2001). Similarly, the Southern District of California refused to adopt a strict scrutiny standard. Rather, it stated that the government must meet the following standard:
>
> First, the government must demonstrate that "administration of anti- psychotic drugs is necessary to accomplish an essential state policy." (Citation omitted). Second, the government must show that "there is a sound medical basis for treatment with anti-psychotic medication." (Citation omitted). In making this showing, the government may provide "medical testimony regarding [Defendant's] mental illness and its symptoms as well as the effects that anti-psychotic medication will have, both beneficial and harmful, on [Defendant's] physical and mental health." Third, and most importantly, the government must establish "that there is no significant risk that the medication will alter in any material way the defendant's capacity or willingness to react to testimony at trial or assist counsel." (Citation omitted). [T]he government must establish these elements by clear and convincing evidence.
>
> *United States v. Sanchez-Hurtado*, 90 F.Supp.2d 1049, 1055 (S.D.Cal.1999). Like our sister courts, we believe that we must apply some sort of heightened standard of review, but unlike the Sixth Circuit, we do not adopt the strict scrutiny standard. *See e.g. Weston*, 255 F.3d at 888 (noting that the Supreme Court denied adopting a strict scrutiny test in *Riggins* but also appeared not to apply a reasonableness test or its various analogues: arbitrary and capricious, rational basis or exercise of professional judgment).

[6] The first question, therefore, is whether the district court erred by holding that the government's interest in bringing Sell to trial is sufficient to outweigh Sell's interest in refusing medication. This is a mixed question of law and fact, so we review the district court's finding de novo. *See Boysiewick v. Schriro*, 179 F.3d 616, 619 (8th Cir.1999). To make this determination, we must weigh the government's interest in rendering Sell competent against Sell's interest in refusing unwanted medication.

[7][8] The government has an essential interest in bringing a defendant to trial. *See Illinois v. Allen*, 397 U.S. 337, 347, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and a prerequisite to social justice and peace."). Not all charges, however, are sufficient to justify forcible medication of a defendant; rather, the charges must be serious. *See United States v. Brandon*, 158 F.3d 947, 961 (6th Cir.1998). Here, the sixty-two charges of fraud and the single charge of money-laundering are serious, a fact not denied by the defendant. [FN8] Despite Sell's significant liberty interest in refusing antipsychotic medication, in view of the seriousness of the charges, we believe that the government's interest in restoring his competency so that he may be brought to trial is paramount. [FN9]

> FN8. Although Sell is also charged with conspiring to murder an FBI officer and a witness, we base our reasoning solely on the seriousness of the fraud charges. It is possible that Sell's threats after his first indictment were a manifestation of his delusional disorder and we decline to make a determination about whether those charges suffice to involuntarily medicate him.
>
> FN9. We note that the government's interest in preserving a scheme of ordered liberty can only be achieved if a defendant is competent at trial. If the medication does not render Sell competent, his trial cannot proceed. *See infra* Part II.D.

[9][10] The second part of our analysis is whether the district court erred in finding that there were no less intrusive means by which the government may achieve its essential interest. *See Riggins*, 504 U.S. at 135, 112 S.Ct. 1810 (noting that the government must prove that there is no less intrusive means). The government may not constitutionally bring an incompetent defendant to trial, *see Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), so the only way the government may try Sell is by restoring his competency. Both Dr. Wolfson and Dr. DeMier testified that antipsychotic medication is the most effective treatment for delusional disorder and that it is the only way Sell could be restored to competency. *See* Transcript of Evidentiary Hr'g, Sept. 29, 1999 at 21, 75-78. Even Dr. Cloninger, who submitted an affidavit on behalf of Sell and stated that antipsychotic drugs are not a proven treatment, did not suggest any alternative means of restoring competency. *See generally* Cloninger Aff. Based on this evidence, we believe that the district court correctly concluded that there were no less intrusive means.

Third, we must determine whether the evidence supports the district court's conclusion that antipsychotic medication is medically appropriate for Sell's treatment. We review the district court's findings of fact under the clearly erroneous standard. *See Love v. M.D. Reed*, 216 F.3d 682, 687 (8th Cir.2000). Whether a proposed action is medically appropriate depends on the judgment of medical professionals. *See *569 Harper*, 494 U.S. at 231, 233-34, 110 S.Ct. 1028. At the hearing before the Magistrate Judge, the government presented testimony from Dr. DeMier and Dr. Wolfson. Dr. DeMier, Sell's treating psychologist, testified that antipsychotic medication is the only treatment that has been shown to be effective in treating delusional disorder and it is the only treatment that could restore Sell to competency. He also stated that he has treated two patients suffering from delusional disorder with antipsychotic medication. Of the two, one was

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restored to clinical competency; the other patient improved, but did not regain competency. [FN10] Dr. DeMier also stated that antipsychotic medications have "potentially significant side effects, but there's also potentially, very significant recovery from symptoms."

FN10. The patient who was successfully treated was given Haldol, a typical antipsychotic drug. The patient who was not restored to competency received Olanzapine, an atypical antipsychotic drug.

Dr. Wolfson, the staff psychiatrist who works as a consultant on Sell's case, also recommended that Sell be treated with antipsychotic drugs. Dr. Wolfson has treated seven patients with delusional disorder but only four for the purpose of restoring competency. [FN11] Dr. Wolfson reported that all seven benefitted clinically from antipsychotic medication and of the four who were treated for restoration of competency, three regained competency. Dr. Wolfson testified that the medical literature indicated that patients with delusional disorder respond less to medication than patients with other illnesses, but he stated that he doubts the accuracy of that conclusion and noted that the literature shows favorable results in many cases. [FN12] Dr. Wolfson admitted that there are both harmful and unpleasant side effects to antipsychotic drugs; these include sedation, neuroleptic malignant syndrome, which is rare but fatal, [FN13] and tardive dyskinesia and/or dystonic reaction, which causes a person to have involuntary movements of various parts of the body. Dr. Wolfson also stated, however, that the existence and/or degree of side effects could be controlled by changes in the doses and type of medication being used. He testified that the new generation of atypical antipsychotic drugs, such as Pimozide, have more benign side effects than the older typical antipsychotic drugs, such as Haldol. Dr. Wolfson admitted, however, that the atypical drugs can only be administered orally, and therefore cannot be used to forcibly drug uncooperative patients.

FN11. He treated one of the patients twice. This patient was restored to competency, relapsed, then restored a second time.

FN12. Dr. Wolfson explained that:

First, the delusions stop expanding.... It's even conceivable that some delusional material may regress.... [O]ur first goal [is] to diminish the impact on ... actions and ... judgment of the illness. Second, [is] to minimize the expansion of the delusional system.... [I]t's typically been my experience [that this is] accomplished with other patients.

Transcript of Evidentiary Hr'g, Sept. 29, 1999 at 137.

FN13. Dr. Wolfson testified that the incidence of this side-effect is one in ten thousand cases.

To combat this testimony, Sell presented the affidavit of Dr. Cloninger. Dr. Cloninger stated that "there is no evidence that [antipsychotic medications] are beneficial for patients with Delusional Disorder." Cloninger Aff. at 8. Dr. Cloninger admitted that antipsychotic drugs are often beneficial in treating schizophrenia but maintained that they do not provide the same benefit in the treatment of delusional disorder. Dr. Cloninger attached to his affidavit an excerpt from the American Psychiatric ***570** Press Textbook of Psychiatry. That text notes that there is a disagreement between experts on the effectiveness of treating delusional disorders with antipsychotic medication, but it also states that the medication may be useful, particularly for accompanying anxiety, agitation, and psychosis. Donald W. Black et al., *Schizophrenia, Schizophreniform Disorder, and Delusional (Paranoid) Disorders*, in *Textbook of Psychiatry* (John A. Talbott et al. eds.) 1988. Dr. Cloninger was not able to recommend a less intrusive alternative to restore Sell to competency; rather, he suggested that treatment be limited to basic support and voluntary symptomatic treatment, and that such treatment also include access to exercise and reading material. *See* Cloninger Aff. ¶¶ 18-19.

In addition, Sell also presented the court with a report from the Federal Bureau of Prisons Institutional Metropolitan Correctional Center ("MCC") in which Dr. Daniel Greenstein, the forensic psychologist at MCC, stated that delusional disorders do not typically respond to medication or psychotherapy.

Based on the totality of this evidence, Sell argues that the district court was clearly erroneous in finding that antipsychotic medication was medically appropriate. He contends that the district court erred by basing its finding, in part, on testimony that atypical antipsychotic medications have more benign side effects, because atypical drugs can only be administered orally, thus they cannot be given involuntarily. Sell also argues that the government did not prove that the medication has a reasonable

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probability of restoring competency. Finally, Sell argues that the court erred in finding medical appropriateness when the government failed to disclose which medication it would use. [FN14] Sell posits that without knowing which drugs would be administered, he was incapable of making anything more than a generalized argument. *See United States v. Sell*, No. 4: 98CR177 at 7 (April 4, 2001) (upholding Magistrate's order allowing the involuntarily medication of Sell and stating that Sell's arguments against medication were generalized).

FN14. Dr. Wolfson stated that he did not want to be pinned down to a single drug because he hoped to leave part of the choice up to Sell. He recommended that the drugs Quetiapine or Olanzapine be used.

[11] We disagree with these assertions. We acknowledge that there is a difference of opinion on the efficacy of using antipsychotic drugs to treat delusional disorder, but we do not believe that the district court committed clear error in finding that the government proved medical appropriateness by clear and convincing evidence. First, the government presented evidence that the medication can reasonably be expected to minimize Sell's delusions and render him competent for trial. Dr. DeMier has a 50% success rate and Dr. Wolfson has a 75 % success rate in restoring competency to patients with delusional disorders. Moreover, the medication improved the condition of all the patients they treated, whether or not they were restored to competency. Dr. Wolfson testified about how the medication works, stating that the medication should reduce the impact of the delusion on Sell's thought process. Although we cannot say with 100% certainty whether Sell will regain competency with his treatment, the district court did not clearly err in finding a sufficient likelihood that antipsychotic medication will restore Sell's competence.

Second, the government proved that the side-effects produced by the medication could be minimized through careful treatment and changing medications and dosages. ***571** Although Dr. Wolfson did not name a specific medication, he did name the two he would most likely use. Therefore, we reject Sell's contention that he was not given the opportunity to make specific objections to specific drugs. Furthermore, we reject Sell's argument that the court erred in basing its opinion in part on the availability of atypical antipsychotic drugs which can only be administered orally. The availability of the atypical medications was not determinative to the district court's findings, and the evidence supports the conclusion that the doctors treating Sell will be able to reduce the incidence of unpleasant and harmful side-effects produced by typical antipsychotic medication as well.

Finally, the district court appropriately considered Sell's medical interest. The court noted that Sell's delusions interfere with his ability to make sound judgments about his life and his treatment, and that his disorder currently impairs and misleads his interpretation of reality and his reasoning. The government presented evidence that antipsychotic medication is commonly used to help reduce delusions and their impact on an individual's life, and the court found that these benefits outweighed the risks associated with antipsychotic drugs.

The district court did not err in applying the wrong standard of review. As required, the court found that the government has an essential interest in adjudicating the serious charges against Sell. The court found that involuntary medication is the only way for the government to achieve its interest in fairly trying Sell and found that the medication is medically appropriate for him. The government proved these elements by clear and convincing evidence. Therefore, we find no reversible error in the standard of review employed by the district court.

We note, however, that this is a limited holding. We do not believe this standard will be met in all circumstances in which the government wishes to restore competence. Furthermore, we note that an entirely different case is presented when the government wishes to medicate a prisoner in order to render him competent for execution. *See, e.g., Singleton v. Norris*, 267 F.3d 859 (8th Cir.2001), *vacated and reh'g en banc granted* (Dec. 5, 2001). Therefore, our holding must be read narrowly.

D. Sell's Sixth Amendment Rights

[12] Finally, we consider whether the district court properly considered Sell's Sixth Amendment right to a fair trial when it ordered the forcible medication. The district court held that Sell's Sixth Amendment claim was premature because the effects of the medication on his competency to assist counsel and on his demeanor could properly be considered after medication. We note that before forcibly medicating an accused, there must be evidence that he will be able to participate in a fair trial. *See Brandon*, 158

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F.3d at 960. That burden was met in this case. First, the magistrate found that the evidence indicated that Sell would be able to participate meaningfully in his trial while he is under the influence of the medication. *See United States v. Sell*, 4:98CR177 at 13 (E.D.Mo. Aug. 9, 2000). Also, the magistrate found that the medication would allow him to communicate with his counsel in a rational manner. *See id.* The magistrate further noted that Dr. Wolfson intends to use drugs with a low side-effect profile, to change drugs and dosages based on the side-effects Sell experiences, and above all, to avoid sedation. *See id.* The district court affirmed these findings. *See generally United States v. Sell*, 4:98CR177 at 5-9 (E.D.Mo. Apr. 4, 2001).

***572** We find that the medical evidence presented indicated a reasonable probability that Sell will fairly be able to participate in his trial. As a result, we believe that the effects of the medication on Sell's competency and demeanor may properly be considered once the medication is administered. The district court noted its willingness to re-examine Sell's Sixth Amendment claim after the medication regimen has begun. *See id.* at 15. The evidence offered, that the drugs should not interfere with Sell's right to a fair trial, as well as post-medication procedures that ensure he will not be tried unfairly, are sufficient to protect Sell. There is no reversible error.

III. Conclusion

Having found no reversible errors, we affirm the district court's determination that Sell may be involuntarily medicated for the purpose of rendering him competent to stand trial.

BYE, Circuit Judge, dissenting.

Unlike the majority, I would apply the strict scrutiny standard of review for the reasons enunciated by the Sixth Circuit in *United States v. Brandon*, 158 F.3d 947, 956-61 (6th Cir.1998). But even under the majority's three-part test, the charges against Dr. Sell are not sufficiently serious to forcibly inject him with antipsychotic drugs on the chance it will make him competent to stand trial. I therefore respectfully dissent.

The first part of the majority's test requires the government to demonstrate an essential interest that outweighs his interest in remaining free from medication. *Ante* at 567. The majority perfunctorily concludes the government's interest in prosecuting the defendant for sixty-two counts of fraud and one count of money laundering qualifies as an essential interest that trumps Dr. Sell's significant liberty interest in refusing antipsychotic medication. I strongly disagree.

While the government possesses an interest in bringing a defendant to trial, *ante* at 568, I do not believe every charge is sufficient to justify forcible medication of a defendant. *See Riggins v. Nevada*, 504 U.S. 127, 135, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (stating the government *might* be able to medicate a defendant involuntarily if "it could not obtain an adjudication of [his] guilt or innocence by using less intrusive means") (emphasis added). It is helpful to compare two recent decisions confronting this precise issue. In *United States v. Weston*, 255 F.3d 873 (D.C.Cir.2001), the Court of Appeals for the District of Columbia recognized the government's interest in adjudicating those who violate the law. In that case, Russell Weston entered the Capitol building and shot three police officers, killing two of them. A grand jury indicted Weston on two counts of *murder*, and one count of *attempted murder* of a federal law officer, in addition to three counts of *using a firearm in a crime of violence*. *Weston* explained that "[t]he government's interest in finding, convicting, and punishing criminals reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business." 255 F.3d at 881. *Weston* also noted "[t]he statutory sentences for the crimes Weston is accused of committing--*life in prison and death*--reflect the intensity of the government's interest in bringing those suspected of such crimes to trial." *Id.* (emphasis added).

*Weston* typifies the case where the government's interest is paramount because the charges include the most serious crimes known to man. Few cases involve crimes as serious as those in *Weston*, however. ***573** In *Brandon*, the Sixth Circuit noted the government's reduced interest in trying a defendant accused of lesser crimes. 158 F.3d at 947. Ralph Brandon was charged with sending a threatening communication through the mail. The Sixth Circuit stated "[w]e find it difficult to imagine ... that the government's interest in prosecuting the charge of sending a threatening letter through the mail could be considered a compelling justification to forcibly medicate Brandon." *Id.* at 961; *cf. Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir.1984) (questioning whether the state's interest in trying suspects could ever outweigh a criminal defendant's

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interest in avoiding forcible medication with antipsychotic drugs). *Brandon* also noted the maximum penalty the defendant faced for sending a threatening communication--five years imprisonment. 158 F.3d at 961.

*Weston* and *Brandon* teach us that the forcible administration of antipsychotic medication may be warranted when the government seeks to prosecute incontestably serious crimes, but not when it seeks to prosecute crimes less so. Cases involving crimes of intermediate severity may present vexing questions, but Dr. Sell's case poses no such challenge. The crimes with which he has been charged are comparable to those in *Brandon* and thoroughly distinct from those in *Weston*. Dr. Sell is charged with making false representations in connection with the payment of health care services, 18 U.S.C. § 1035(a)(2), and money laundering, 18 U.S.C. § 1957(a). The maximum penalty for these charges is five and ten years imprisonment, respectively. He cannot be put to death nor imprisoned for life if convicted of these crimes, as was the case in *Weston*. He is charged with crimes which are far less serious than the violent, heinous and deadly crimes with which Weston was charged. Indeed, they are nonviolent and purely economic. There is no identifiable victim for these types of crimes; rather, only society's interest is harmed.

The majority deems the charges serious in part because of the number of counts Dr. Sell faces (63). At first blush, the sixty-two counts of fraud and the single count of money laundering might appear to make the charges seem more serious, but the sheer number is an inaccurate yardstick for measuring the severity of his alleged offenses. He will be sentenced under the United States Sentencing Guidelines, which direct his sentence to be determined by the total dollar value of the fraud, *not* the number of counts. *See* U.S. Sentencing Guidelines Manual (U.S.S.G.) ch. 3 pt. D & §§ 5G1.2, 2B1.1, 2S1.1 (2001). An overly generous estimation of Dr. Sell's alleged illegal activity would place the value of his fraud within the range of $400,000 to $1,000,000. Applying this estimate, his base offense level would be 20 and (assuming he has no prior criminal history) his sentencing range would be 33-41 months. *See* U.S.S.G. § 2B1.1. This sentencing range demonstrates the charges against him are not serious enough to justify forcible medication. *Ante* at 568 ("Not all charges, however, are sufficient to justify forcible medication of a defendant; rather, the charges must be serious"). In any event--setting aside the Guideline estimations altogether--Dr. Sell's potential sentence is far more proportional to the maximum five year sentence in *Brandon* than to the maximum life-in-prison and death sentences in *Weston*.

The majority states Dr. Sell does not deny the severity of the fraud and money laundering charges. *Ante* at 568. This representation is wrenched from its context, however. While he does not deny the severity of these charges in the abstract, ***574** he certainly does not concede they are serious enough to warrant forced medication. In fact, Dr. Sell devotes most of his efforts to defending and minimizing the charges of conspiring to murder an FBI agent and witness, not to discussing the fraud and money laundering charges.

More telling still, neither the government nor the district court believe the fraud and money laundering charges *alone* support the forcible administration of medication. The government all but dismisses these counts when arguing about the severity of the charges against him. The government focuses its attention almost entirely on the charges related to the conspiracy to murder the FBI agent and witness. Neither in its brief, nor during oral argument, has the government claimed the fraud and money laundering charges by themselves are serious enough to warrant forced medication. Likewise, the district court acknowledged the conspiracy to commit murder charges tipped the balance in its conclusion that Dr. Sell's alleged offenses were serious enough to warrant the forcible administration of antipsychotic drugs.

Although the majority properly omits the charges of conspiracy to commit murder from its analysis, *ante* at 568 n. 8, the majority inexplicably turns a blind eye to the apparent agreement of all parties that the fraud and money laundering charges alone are insufficiently serious to warrant forcible medication. This course of action is questioned.

This is not meant to suggest the crimes with which Dr. Sell has been charged should not be prosecuted. They will and should be. However, this defendant should not be forced to take antipsychotic drugs in order to be prosecuted for them. The government's interest in forcibly medicating an accused murderer may be essential, but its interest in forcibly medicating an accused thief is not. In my view, these charges are not serious enough to warrant the forced medication of the defendant, who, we must not forget, is a non-dangerous pre- trial detainee cloaked with

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the presumption of innocence. As a result, the government has failed to satisfy the first part of the majority's three-part test.

* * * * * *

The government is not without recourse upon a finding that the charges against Dr. Sell are insufficiently serious to warrant forcible medication. He will not be set free. A civil commitment is in order for him until he becomes competent, or voluntarily agrees to take medication. *See Riggins*, 504 U.S. at 145 (Kennedy, J., concurring) (stating that if the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment). The government asserts that its interest in punishing crime will be diminished by the option of civil commitment. It is true Dr. Sell's criminality will not be adjudicated as the civil commitment unfurls. However, the government's interest in forcing him to stand trial on charges that may result in such limited punishment does not outweigh his substantial rights under the First, Fifth and Sixth Amendments. *See Brandon*, 158 F.3d at 956-61 (enumerating an individual's rights in refusing antipsychotic medication).

I respectfully dissent.

282 F.3d 560

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
AUG 09 2000
U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 4:96CR177 DJS |
| | ) | 4:97CR290 DJS |
| CHARLES THOMAS SELL, | ) | (Consolidated) |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM AND ORDER**
**OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the court on the government's motion to involuntarily medicate the defendant using anti-psychotic drugs. The government further requests that the defendant's period of commitment be extended while the defendant is involuntarily medicated. On September 29, 1999, the undersigned held a hearing on the motion. Based on this hearing as well as other matters detailed below, the undersigned makes the following findings of fact and conclusions:

**Background and Findings of Fact**

On May 16, 1997, defendant Charles Sell was charged in a complaint with making false representations in connection with the payment of health care services in violation of 18 U.S.C. § 1035(a)(2). On that same date, the defendant was arrested and afforded his initial appearance. On May 20, 1997, the government filed a motion for psychiatric examination of the defendant to determine his competency to stand trial. The motion states that the defendant has a history of mental illness, and is described by his employees as irrational and prone to angry and violent outbursts. On May 20, 1997, a magistrate judge granted the motion and the defendant

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was sent to the U.S. Medical Center for Federal Prisoners at Springfield, Missouri, for an evaluation.

On July 2, 1997, a psychiatric evaluation report was received from Springfield, and on July 15, 1997, a hearing was held to determine the defendant's competency to stand trial. At the hearing, the court, without objection, considered the psychiatric evaluation report from Springfield. The report concluded that the defendant was currently competent to stand trial, but that there was a possibility that the defendant could, in the future, develop a psychotic episode, and that his paranoid personality characteristics would color his relationship with his counsel. Based on the report, the judge found the defendant currently competent to stand trial. On July 30, 1997, an indictment was returned against the defendant and his wife charging them with fifty-six counts of mail fraud, six counts of medicaid fraud, and one count of money laundering.

Six months later, on January 22, 1998, a petition was filed alleging that the defendant violated his conditions of release by attempting to intimidate a witness. Based on this petition, a warrant was issued for the defendant's arrest. On January 23, 1998, the defendant was arrested and brought to a magistrate judge's courtroom for his initial appearance. At that point, the defendant was out of control, screaming, shouting, and using racial epithets. Because of the defendant's out-of-control behavior and at the request of the U.S. Marshals Service, the judge attempted to conduct the initial appearance in the Marshal's secure area. As the proceeding commenced, Dr. Sell began screaming and shouting personal insults at the judge and, as the judge started to advise the defendant of his rights, the defendant spat directly in the judge's face. In the judge's words, the defendant appeared "totally out of control."



On January 26, 1998, a bond revocation hearing was held and shortly thereafter, the defendant's bond was revoked and he was ordered detained. One factor considered by the judge was the report of a psychiatrist who was seeing Dr. Sell as a part of Dr. Sell's conditions of release. The psychiatrist reported that, as of January 21, 1998, Dr. Sell's mental condition was worsening. He said that Dr. Sell was not sleeping at night because he was staying up guarding his doors because he was expecting the FBI to "come busting through the door." The psychiatrist said that while Dr. Sell was not an immediate danger, this status could change at any time and Dr. Sell could become a danger. He said Dr. Sell needed to be treated with anti-psychotic medications.

On April 23, 1998, the defendant was charged in a second indictment with one count of conspiring to murder a witness in his fraud case and conspiring to murder an FBI agent who was working on the case, four counts of attempting to murder two separate witnesses in the case, and two counts of attempting to murder an FBI agent.

During the next several months, this matter was set for trial on multiple occasions, but was continued at the request of both parties. The defendant appealed at least two matters to the Court of Appeals during this time period. On February 10, 1999, the defendant filed a motion asking this court to hold a hearing and determine whether or not Dr. Sell was competent to proceed to trial in this matter. The motion stated that in the opinion of Dr. Sell's psychiatrist and psychologist, Dr. Sell was not currently competent to proceed to trial. On February 22, 1999, the undersigned granted the government's separate motion to have Dr. Sell examined at the Springfield Medical Center to aid in the determination of the defendant's competency to stand trial. On April 14, 1999, the undersigned held a hearing to determine Sell's competency. Based

on the evidence presented at that hearing, and without objection from the defendant, the undersigned found that the defendant was presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial, particularly finding that the defendant was not competent to assist properly in his defense.

On April 14, 1999, based on this finding, the undersigned determined that Dr. Sell was incompetent to stand trial, and ordered that Dr. Sell be hospitalized for treatment in the U.S. Medical Center for Federal Prisoners for a period not to exceed four months to determine whether there was a substantial probability that the defendant would attain the capacity to allow his trial to proceed.

In June, 1999, an administrative hearing regarding the involuntary administration of anti-psychotic medication was held at the U.S. Medical Center for Federal Prisoners. Pursuant to this court's order, defendant's counsel was allowed to participate in the hearing. In July of 1999, based on findings made by the hearing officer, the involuntary administration of anti-psychotic medication was authorized by the institution.

On August 20, 1999, the undersigned granted defendant's motion for a judicial hearing to determine the propriety of the administration of anti-psychotic medication, and stayed the administration of the medication by the institution pending the hearing. The undersigned also granted the institution's request to grant a 120-day extension of his commitment to Springfield. As stated, the hearing was held on September 29, 1999. The evidence, as submitted at the hearing by the testimony of a psychiatrist and psychologist from the Springfield medical center, as well as the affidavit of the defendant's psychiatrist and other defense exhibits revealed the following:



Dr. Richart DeMier, Ph.D., is a staff psychologist at the Medical Center for Federal Prisoners, Springfield, Missouri, and has been so employed for approximately five years. Dr. DeMier is the staff psychologist primarily responsible for the diagnosis of Dr. Sell's illness and for the day-to-day treatment of Dr. Sell. He has been in at least weekly contact with Dr. Sell, both during his first admission to the hospital, and during his most recent commitment in April, 1999. In addition to very frequently seeing and talking to Dr. Sell, DeMier also receives frequent reports from the staff of the medical center who are in daily contact with the defendant.

Based on these interviews and other information, Dr. DeMier has concluded that Dr. Sell is suffering from delusional disorder of the persecutory type, a very serious and potentially dangerous psychosis. Dr. DeMier also concluded that the defendant's judgment is very poor and becoming worse each day that he is not treated with anti-psychotic medications.

As evidence of this deterioration, in July, 1999, Sell formed an infatuation with a female nurse on the staff of the medical center. He told the nurse that she was very special to him, and that the nurse did not realize how much she meant to him. When told that it was inappropriate to talk to the nurse in this familiar manner, he did not stop the familiarity, and told the nurse and other staff members that he could not help himself, and that he could not stop this conduct. Although he did not touch the nurse, he said that he would do so if she asked him, and the nurse considered him to be a danger to her safety. He also told staff members that he could "smell" the nurse's presence. During this same time, the defendant also told DeMier that he was afraid to be transferred to a county jail because he was certain that the FBI was actively involved in a plan to have him murdered. He also told DeMier that DeMier would be ordered to release him from custody so he could go to Bosnia with his army reserve unit, as this was essential to the

national security. He also told DeMier that DeMier would be personally called before Congress to explain his mishandling of Dr. Sell's case.

Because of Sell's specific focus on the nurse, his increasing personalization of the perceived murder plot by the FBI, his personalization of animosity toward DeMier along with the defendant's history of committing an assault on a federal judge, and the fact that the defendant was charged with conspiring to murder an FBI agent and two witnesses in his case, DeMier concluded at the September 29, 1999 hearing, that the defendant was an immediate risk to commit violent acts, and was dangerous to himself and to others. DeMier said that because Sell believes that people (including the FBI and DeMier) are out to get him, given Sell's mental condition, Sell is likely to "protect himself" by harming people who have no intention of doing any harm to him. The fact that Sell's delusional beliefs have become more focused makes Sell an immediate risk of violence to himself or others.

Because of this danger, Sell is being held in the most secure area of the Springfield medical center, and is allowed out of his holding area only for short periods of time. Although this ameliorates the defendant's danger to himself and the staff, it does not eliminate this danger because the staff still must have contact with him.

DeMier also believes that, based on his training and experience, the only treatment that will improve Sell's condition is the use of anti-psychotic medications, because there is no other effective treatment for the illness. He further believes that if Sell does not receive anti-psychotic medication, his condition will continue to deteriorate. However, if anti-psychotic medications are administered, it is likely that the defendant will be restored to competency, and that the danger caused to the staff by Sell's condition will be greatly reduced.



DeMier has treated two patients in the recent past for delusional disorder with anti-psychotic medications, and both treatments were successful. One of the patients was restored to competency, and the other patient was greatly improved and rendered not dangerous to the extent that he was released from prison. DeMier also believes that the benefits of using anti-psychotic medications greatly outweigh any risks, and that the use of these medications is the only way to render the defendant not dangerous and to restore him to competency. According to the medical literature, anti-psychotic medication is the treatment of choice for delusional disorder, and delusional disorder responds favorably to the use of anti-psychotic medications.

Dr. James Wolfson, M.D., is a staff psychiatrist at the Springfield medical center and is the consulting psychiatrist on Dr. Sell's case. Based on his interviews of Dr. Sell, and his review of the medical center's records, it is Wolfson's opinion that Sell is psychotic, and that the only way to treat Sell's condition is with anti-psychotic medications. Without this treatment, Wolfson believes that Sell's condition will continue to deteriorate. Further, based on Sell's history and conduct, Sell is currently dangerous, and anti-psychotic medications will greatly reduce the risk of violence by Dr. Sell, and will render him not dangerous.

Dr. Wolfson has treated 1,000 to 2,000 patients with anti-psychotic medications, and has achieved good results in a great majority of these cases. In addition to rendering Sell less dangerous, Wolfson believes that there is a good chance that Sell can be restored to competency by the use of anti-psychotic medications. In the recent past, Wolfson has used anti-psychotic medications on five patients with delusional disorder, and has been successful in restoring four of these patients to competency, an eighty per cent success rate.

Further, Wolfson vehemently disagrees with the defendant's psychiatrist, that anti-psychotic drugs are not effective and should not be used in the treatment of delusional disorder. Wolfson says that the medical literature, his own experience, and the very experts relied on by the defendant's psychiatrist, show that anti-psychotic medications, when combined with psychotherapy, are effective in the treatment of delusional disorder. Further, even the defendant's psychiatrist agrees that anti-psychotic drugs are effective in the control of agitation and dangerousness in patients with delusional disorder.

According to Wolfson, there are three main side effects involved in using anti-psychotic drugs. The first is tartive dyskinesia and/or distonic reaction. This side effect causes a person to have involuntary body movements of various parts of the body. This is not a permanent side effect, and this condition can be ameliorated by the use of other medications along with the anti-psychotic drugs, or by switching from one anti-psychotic medication to another anti-psychotic medication. The side effect is not life threatening, and as stated is not a permanent side effect, but will go away with the use of other medications or withdrawal of the medication.

Another side effect is that some patients are somewhat sedated by the medication. With newer drugs, this side effect occurs infrequently and can be alleviated by changing the dosage of the medication. Further, because one of the purposes of the medication is to allow patients to assist effectively in the preparation and defense of their cases, Wolfson uses medications that do not significantly sedate the defendant or impair the ability of the defendant to assist in his own defense.



According to Wolfson, the other major serious side effect from the medication is neuroleptic malignant carcinoma which can be fatal. Of the 1,000 to 2,000 patients Wolfson has medicated with anti-psychotic drugs, none have developed this syndrome, and Wolfson has seen this complication occur only twice during his career. According to the medical literature, this condition occurs in about 1 in 10,000 patients who take the medication. Further, Dr. Wolfson desires to medicate the defendant with newer drugs, which have a much lower side effect profile than older medications.

It is also Wolfson's opinion that the only way to treat Sell's condition is with the use of anti-psychotic drugs, and it would be irresponsible and wrong not to use these medications. Without these medications the defendant will continue to suffer from a catastrophic and debilitating illness, from which he is never likely to recover. For all of these reasons, Wolfson believes that the benefits of using the medication far outweigh any risk from the medication in any patient he would treat for this illness, whether or not the person was incarcerated or institutionalized in any way.

At the conclusion of the hearing, both the defendant and the government requested permission to delay briefing the issues presented at the hearing until after a transcript was prepared. After requests for more time to file the memoranda by both parties, the briefs were eventually filed before the court at the end of January, 2000. Almost simultaneously with the filing of these memoranda, on January 31, 2000, Sell's attorneys filed a motion for relief from involuntary commitment stating that he was being illegally held at Springfield beyond the time permitted by the statute, and requesting that he be immediately released. Further, in partial

response to this motion, the government filed a motion for the extension of Dr. Sell's commitment to Springfield on February 3, 2000.

On March 20, 2000, the U.S. Medical Center for Federal Prisoners wrote the court asking that Dr. Sell's commitment be extended. Included in the report is a report from Dr. DeMier on Sell's mental condition. The report states that Sell's condition has deteriorated to the extent that the risk of physical injury to the staff and to Dr. Sell has become greater because of Sell's increased volatility and paranoia. Dr. DeMier also states that Sell's infatuation with the nurse at the facility has worsened to the point that his thoughts about her have outweighed other issues that should be much more important to him. DeMier described Sell's behavior as volatile because it can change suddenly without any apparent reason. In summary, DeMier concludes as follows:

> Anti-psychotic medication remains the only effective treatment for his mental illness. Without the opportunity to treat the defendant, he will continue to suffer from a debilitating and catastrophic illness, and we are placed at increased, even inevitable, risk of harm to the defendant or those charged with his care.

He further states that the use of anti-psychotic medications will provide the defendant with a good chance of being restored to competency.

**Conclusions**

Based on the above facts, as well as the law stated below, the undersigned orders the involuntary medication of Dr. Sell. In the case of Riggins v. Nevada, 504 U.S. 127 (1992), the court stated as follows:

> Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due



> process if the prosecution had demonstrated and the district court had found that treatment with anti-psychotic medication was medically appropriate and considering less intrusive alternatives essential for the sake of Riggins' own safety and the safety of others.

504 U.S. 127, 135.

Further, in United States v. Morgan, 193 F.2d 252 (4th Cir. 1999), the court stated as follows in ordering the forced medication of a pretrial detainee because the detainee was a danger to himself and others:

> The fact remains, however, that the finding that treatment with anti-psychotic medication was necessary to render Morgan competent to stand trial was accompanied by a finding that such medication was necessary because he is dangerous to himself and to others at Springfield. Although Morgan provides us with no psychiatric evidence supporting a conclusion that the dangerousness finding was made arbitrarily, he essentially requests that we disregard that finding so that we may evaluate the constitutionality of permitting Springfield medical personnel to make the determination of whether to forcibly medicate him solely for the purpose of rendering him competent to stand trial. This we are unwilling to do. We realize that forcibly medicating a pretrial detainee on the basis that such treatment is necessary because he is dangerous to himself or others in the institutional setting might have the incidental effect of rendering him competent to stand trial. However, if such an occurrence would come to pass in the present matter, Morgan would not simply be thrust into the courtroom for trial without additional procedural protections. Rather, he would be statutorily entitled to have a district judge conduct a pretrial examination of his competency to stand trial in the context of an evidentiary hearing at which time he would be represented by counsel and permitted 'to testify, to present evidence, to subpoena witnesses on his own behalf, and to confront and cross examine witnesses who appear at that hearing.' Morgan could be brought to trial only if the government proved to the district judge by a preponderance of the evidence that Morgan was able to understand the nature and consequences of the proceedings against him and to assist properly in his defense...Assuming that the government succeeded in this regard, Morgan may be entitled to even further

> procedural protection should the government forcibly plan to medicate him at any point during trial. Specifically, due process would require the district judge make findings as to the need for and medical appropriateness of such medication during trial. The district judge might also ensure the medication posed no significant risk of altering or impairing Morgan's demeanor in a manner that would prejudice his capacity or willingness to either react to testimony at trial or to assist his counsel.

193 F.3d 252, 264.

In Papantony v. Hedrick, 215 F.3d 863 (8th Cir. 2000) (a civil case filed by a prisoner at the Springfield Medical Center which the Court of Appeals construed as a Bivens action for damages) the court ruled as follows in rejecting the claim:

> A government official is immune from a Bivens suit unless the official's conduct violates a clearly established constitutional right. In Papantony's case the right is far from clearly established. In fact, Papantony as a pretrial detainee likely has no substantive due process right not to be forcibly administered anti-psychotic drugs to render him competent to stand trial. See Riggins v. Nevada, 504 U.S. 127. Finally, although we reject any remedy for Papantony at this time, circumstances could change and anti-psychotic drugs might eventually render Papantony competent to stand trial. If that occurs, this decision will not foreclose a future argument by Papantony that forced medication during trial violates his right to a fair trial. See generally United States v. Morgan, 193 F.2d 252 (4th Cir. 1999).

Given the above law, the undersigned concludes that the government has made a substantial and very strong showing that Dr. Sell is a danger to himself and others at the institution in which he is currently incarcerated. In addition, the government has shown that anti-psychotic medication is the only way to render him less dangerous, and that the serious side effects of the medication will be ameliorated by newer drugs and/or changing of the drugs. Further, the benefits to Dr. Sell of using the medication far outweigh any risks, the use of such



medication is necessary, and a strong showing of the necessity to use this medication has been made by the government. In addition, as in United States v. Morgan, supra, an ancillary effect of the use of the medication, because Dr. Sell is dangerous, is that there is a substantial probability that Dr. Sell will be returned to competency.

In United States v. Weston, 206 F.3d 9 (D.C. Cir. 2000), the court held that even if a court finds that forced medication is necessary and essential to the defendant's safety and the safety of others, the court must also consider the need for the medication in restoring competency, and the effect of the medication on the defendant's ability to assist in his defense. In the case now at bar, the record reveals that anti-psychotic medication is the only way to render the defendant both not dangerous and to make him competent to stand trial. If Dr. Sell is not medicated, he will continue to suffer from a catastrophic and debilitating illness, will remain incompetent, and remain a danger. According to Dr. Wolfson, if the defendant is medicated and receives psychotherapy along with the medications, his delusions will diminish to the extent that they will no longer control his thinking and actions. Given this, Dr. Wolfson's opinion is that the defendant has a good chance of becoming competent and less dangerous. Because the defendant's delusions will no longer control or dominate his thoughts and actions, the undersigned concludes that if medicated, the defendant will be able to communicate with his counsel in a rational manner in order to assist in his defense. Further, Dr. Wolfson intends to use atypical anti-psychotic drugs with a low side effect profile when medicating Dr. Sell. Dr. Wolfson also intends to avoid sedating Dr. Sell, because his purpose is to allow him to participate meaningfully in his trial. He likewise intends to avoid all other side effects to the

maximum extent possible. Thus, the undersigned concludes that the standard required in Weston, supra, has been met in the case now at bar.

Based on the above, the undersigned concludes that the government has shown in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial on the very serious and violent offenses for which he now stands indicted. There are no other less restrictive means by which this may be accomplished, including other medications, psychotherapy without the use of anti-psychotic medications, and locking down the defendant, all of which have either been attempted or considered. Therefore, the undersigned concludes that Dr. Sell must be involuntarily medicated with anti-psychotic medications.[1]

Based on the above facts and law, the undersigned grants the government's motion for extension of his commitment for a 120-day period of time, because there is a substantial probability that within such period of time, Dr. Sell will attain the capacity to permit the trial to proceed if medicated. The undersigned further notes that because the defendant has (as is his absolute right) refused to take anti-psychotic medication, and explored all legal means possible to avoid taking the medication, Dr. Sell has not yet been treated with the only treatment which the undersigned has concluded will render him less dangerous and competent. Therefore, based on the above, the government's motion for extension of commitment is granted.

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[1] The defendant cites United States v. Brandon, 158 F.3d 947 (6th Cir. 1998) as controlling in this matter. Although the undersigned believes that the government has met the standards required by Brandon, it solely involves the legality of the medication of a non-dangerous pretrial detainee unlike the case now at bar.



The defendant also alleges that he is being unlawfully held beyond the time authorized by the statute, and that it is unconstitutional to indefinitely commit him for purpose of rendering him competent. In United States v. Kokoski, 82 F.3d 411 (4th Cir. 1996), the court ruled that the defendant's right to due process was not violated by an 18-month commitment to obtain his competency. In so holding, the court stated as follows:

> He first argues that § 4241(d) limits the time he may be hospitalized to eight months...We reject this argument. We think 'an additional reasonable period of time' means some reasonable but statutorily undefined period of time. United States v. Ecker, 30 F.3d 966, 969 (8th Cir. 1994). Here we find that Kokoski's 18-month confinement was reasonable. Every report issued before the Butner staff declared Kokoski competent indicated he was likely to regain competency. The final six months of his confinement were necessary to challenge and clarify Butner's conclusion. In light of the district court's careful adherence to statutory procedures, we believe Kokoski's confinement was reasonable. See id. (confinement during seven competency evaluations spanning nearly four years not unreasonable).

82 F.3d 411, 1996 WL 181482. Further, in United States v. Ecker, 30 F.3d 966 (8th Cir. 1994), a case involving at least five competency commitments over a three and a half year period of time, the court stated as follows: "The overall determination of ultimate competency to stand trial can extend over a reasonable period." Id. at 970. Having considered the background and evidence, the Eighth Circuit held that there "was no clear violation of the statute in ordering each of the several competency evaluations nor an unreasonable overall delay in the proceedings under the circumstances." Id. at 970.

Based on the above law, the defendant's request for relief from involuntary commitment should be denied.

Therefore,

**IT IS HEREBY ORDERED** that the government may involuntarily medicate the defendant with anti-psychotic drugs consistent with this memorandum. It is also **ORDERED** that this portion of the court's order shall be stayed for fourteen (14) days to allow the defendant to appeal this portion of the order if he so desires. Any further stay must be granted by a United States District Judge or the United States Court of Appeals.

**IT IS FURTHER ORDERED** that the government's request for an extension of the defendant's commitment be **granted**, and that his commitment is ordered extended for a 120-day period of time effective as of the date of this order.

**IT IS FURTHER ORDERED** that defendant's request for relief from involuntary commitment should be **denied**.

**IT IS FURTHER ORDERED** that this Memorandum and Order supersedes the Interim Order entered by this court on July 28, 2000.

UNITED STATES MAGISTRATE JUDGE

Dated this 9th day of August, 2000.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
APR 4 2001
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES THOMAS SELL,

Defendant.

No. 4:97CR290-DJS
4:98CR177-DJS

**ORDER**

Defendant is a pretrial detainee who has been found incompetent to stand trial and who is currently remanded for treatment to the United States Medical Center for Federal Prisoners at Springfield, Missouri ("USMC"). By order dated August 9, 2000, a United States Magistrate Judge granted the government's request for an order authorizing the involuntary administration of anti-psychotic drugs to defendant. On August 18, 2000, the magistrate judge denied defendant's motion seeking reconsideration of the August 9 order, a reopening of the September 29, 1999 hearing in the matter, and the production of certain evidence. The matter is now before the Court on defendant's appeal of the magistrate judge's denial of defendant's motion for reconsideration of the involuntary medication ruling. For reasons explained fully below, the Court here affirms the magistrate judge's ruling that substantive due process does not preclude the forcible

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administration of anti-psychotic medications to defendant in this case.

Pursuant to 28 U.S.C. §636(b)(1)(A), defendant's motion concerning involuntary medication was referred to the magistrate judge for his consideration and ruling. Order of 7/30/99 [Doc. #323/#188]. Section §636(b)(1)(A) provides that a district judge may "reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law." As indicated above, defendant asks this Court to reconsider the magistrate's denial of the motion to reconsider. In his motion to this Court, defendant characterizes the grounds for reconsideration as follows:

> (1) the Magistrate's findings of fact with regard to the side effects of antipsychotic drugs are squarely refuted by the relevant medical literature and by the testimony adduced at the hearing by both the Government and by Dr. Sell; (2) the Magistrate's finding that Dr. Sell is dangerous is clearly erroneous; (3) the Magistrate improperly based its findings of fact upon the Government's anecdotal evidence and upon communications the Government submitted to the Magistrate ex parte in a post-hearing letter; and (4) the Magistrate's conclusions fail to take into account the effect drugging will have on Dr. Sell's ability to receive a fair trial.

Motion [Doc. #372/#232], p.2. After reviewing the legal principles applicable to the issue of involuntary administration of drugs, the Court will address each of these assertions in turn:



**Due Process and the Forcible Administration of Anti-Psychotic Drugs**

Certain interests deemed sufficiently fundamental to human liberty are protected by the Due Process Clauses of the Fifth and Fourteenth Amendment. A liberty interest in this protected class cannot constitutionally be impinged by government action unless the infringement is narrowly tailored to serve a compelling state interest. See, e.g., Reno v. Flores, 507 U.S. 292, 301-02 (1993). In Washington v. Harper, 494 U.S. 210 (1990), the United States Supreme Court held that a prison inmate's interest in resisting involuntary administration of anti-psychotic drugs had Due Process protection. "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Id. at 220; see also United States v. Brandon, 158 F.3d 947, 956-57 (6th Cir. 1998) [applying the strict scrutiny standard to issue of forcible medication of non-dangerous pretrial detainee].

Riggins v. Nevada, 504 U.S. 127 (1992), involved a pretrial detainee:

> Under Harper, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial...Thus, once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for [it] and the medical appropriateness of the drug.

Id. at 135 (internal citations omitted).[1] Riggins appears to identify two possibilities for the type of government interest sufficient to override the detainee's protected liberty interest, where medical appropriateness is also shown. These interests are the safety of the detainee and others and the detainee's restoration to competence:

> Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with anti-psychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others...Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means.

Id. at 135 (internal citations omitted).

The proceedings before the magistrate judge were based on the defendant's motion for a judicial hearing on the issue, rather than on a motion from the government which might have more clearly identified the legal and factual basis on which the involuntary medication was sought. Both dangerousness and the need to restore defendant to competence are touched upon in the record, however,

[1]The Court respectfully suggests that the Eighth Circuit's per curiam opinion in Papantony v. Hedrick, 215 F.3d 863, 865 (8th Cir. 2000), misspeaks when it characterizes Riggins as indicating that a pretrial detainee "likely has no substantive due process right not to be forcibly administered antipsychotic drugs to render him competent for trial."



and the magistrate judge's determination that the forcible administration is permissible appears to be based on both rationales. Memorandum and Order of 8/9/00 [Doc. #367/#227], pp.12-14. The magistrate judge found as follows:

> [T]he undersigned concludes that the government has shown in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial on the very serious and violent offenses for which he now stands indicted. There are no other less restrictive means by which this may be accomplished, including other medications, psychotherapy without the use of anti-psychotic medications, and locking down the defendant, all of which have either been attempted or considered. Therefore, the undersigned concludes that Dr. Sell must be involuntarily medicated with anti-psychotic medications.

Id. at 14.[2]

**Side Effects and Effectiveness of Anti-Psychotic Drugs**

Defendant first contends that the magistrate judge's findings of fact on the issue of side effects are erroneous. The magistrate judge's order reviews the evidence concerning three potential side effects: tardive dyskinesia, sedation, and neuroleptic malignant carcinoma. The magistrate judge found that "the serious side effects of the medication will be ameliorated by

[2]This portion of the ruling belies defendant's contention that the magistrate judge "wholly failed to address the question of whether or not medication is necessary to render Sell competent for trial," a contention that need not be further addressed. Def. Supplemental Memorandum in Support of Motion to Reconsider [Doc. #403/#262], p.5.

newer drugs and/or changing of the drugs," and that "the benefits to Dr. Sell of using the medication far outweigh any risks." Memorandum and Order of 8/9/00 [Doc. #367/#227], p.12. Tardive dyskinesia is identified as involuntary body movements. The magistrate judge's order indicates that this effect is not permanent and can be ameliorated by supplemental medications or, as necessary, a change in the anti-psychotic medication. Id. at 8. In his motion to this Court, defendant cites to the testimony of a government witness, clinical psychologist Richard DeMier, that the condition is permanent. Motion [Doc. #372/#232], p.9, *citing* Transcript of 9/29/99 Hearing [Doc. #341/#205], p.32.

In his reconsideration ruling of August 18, 2000, the magistrate judge indicated that even if tardive dyskinesia is a permanent effect, he would continue to conclude that "the potential benefit of treatment far outweighs any risk." Memorandum [Doc. #371/#230], p.1. Even under defendant's view of this disputed fact, then, the magistrate judge's conclusion is unaffected. That being the case, any error in his factual finding per se does not require reconsideration by this Court. Furthermore, having reviewed the record upon which the magistrate judge acted, this Court would concur in the conclusion that the medical benefits outweigh the medical risks, giving due weight to the range of seriousness of the various risks, to the prospects for alleviating



certain side effects with supplemental medication, and to the fact that a particular side effect may or may not occur in Dr. Sell.

Defendant also makes generalized arguments concerning the efficacy of anti-psychotic drugs. Having considered all the evidence of record before the magistrate judge, and acknowledging that there exist differences of opinion among practitioners in the field, including the experts relied upon by the parties, the Court cannot conclude that the magistrate judge clearly erred in determining that there is a significant potential medical benefit of treatment with anti-psychotics.[3] As is presumably characteristic in cases of delusions, Dr. Sell does not believe himself to be delusional and, not thinking his delusional beliefs are false, he is not persuaded his delusions require treatment. The Court's analysis begins with a sharply different factual premise, however, namely that Dr. Sell suffers from a serious delusional disorder, which currently significantly impairs and misleads his interpretation of reality and his reasoning. Arguments made on his

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[3]The Court notes that in his appeal to this Court, defendant cites to sources which were not of record before the magistrate judge, some of which could not have been, given their more recent vintage. These include an Indiana Law Review, Postgraduate Medicine (2000), and American Journal of Psychiatry (2000). The Court here acting as an appellate court of sorts, and given the applicable standard of review, the Court's consideration of this new evidence appears to be inappropriate. In any event, the Court notes that its conclusions concerning risk/benefit analysis and the efficacy or appropriateness of anti-psychotics in Dr. Sell's case would be unaffected by consideration of these sources.

behalf which neglect to take this into account are therefore necessarily diminished in their persuasiveness and impact.

The principal basis for the finding of incompetency is the interference of defendant's delusional beliefs with his ability to assist in his defense. These are characterized by his own psychiatrist as "systematized persecutory delusions that he is the victim of a government plot to discredit his allegations about widespread illegal behavior by corrupt individuals to spread HIV and kill innocent civilians throughout the world." 9/28/00 Letter of Dr. Cloninger, attached to Def. Supplemental Memorandum in Support of Motion to Reconsider [Doc. #403/#262]. Defendant believes that this prosecution and the government's position as to his incompetency reflect an effort to cover up his knowledge of the government's culpability in the deaths of David Koresh and his followers in the Branch Davidian compound near Waco, Texas in 1993, knowledge defendant claims to have based on his experiences on Army Reserve duty in Texas at that time. Forensic Psychological Report [Sealed Doc. #304/#169], pp.5-6. Another example of defendant's delusional thinking is described in the testimony of defendant's treating clinician at the magistrate judge's evidentiary hearing:

> [W]hen the U.S. Military initially became involved in the Bosnia conflict, Dr. Sell stated that he expected the U.S. Military to come to our facility to secure his release so that he could go to Bosnia. When he was told that that was not likely to happen, he expressed some delusional beliefs that his presence in Bosnia was absolutely essential to the safety of our troops, and if he weren't permitted to go that would meant that it, to



> use his words -- somebody wanted a lot of American boys dead.

Transcript [Doc. #341/#205], p.11. Risks of unpleasant or even dangerous side effects and the impact of anti-psychotic drugs on Dr. Sell's cognitive processes are counterbalanced by the substantial weight of his current impaired and incompetent state, despite Dr. Sell's protestations to the contrary.

**Dangerousness**

Defendant argues that the magistrate judge's finding that he is currently a danger to himself or others is clearly erroneous. The magistrate judge found:

> Because of Sell's specific focus on the nurse, his increasing personalization of the perceived murder plot by the FBI, his personalization of animosity toward [prison psychologist] DeMier along with the defendant's history of committing an assault on a federal judge, and the fact that the defendant was charged with conspiring to murder an FBI agent and two witnesses in his case, DeMier concluded at the September 29, 1999 hearing, that the defendant was an immediate risk to commit violent acts, and was dangerous to himself and to others. DeMier said that because Sell believes that people (including the FBI and DeMier) are out to get him, given Sell's mental condition, Sell is likely to "protect himself" by harming people who have no intention of doing any harm to him. The fact that Sell's delusional beliefs have become more focused makes Sell an immediate risk of violence to himself or others.

Memorandum and Order of 8/9/00 [Doc. #367/#227], p.6. The dangerous nature of the charges against Dr. Sell, involving a murder plot, is self-evident. The government made little attempt to establish of record before Judge Adelman the particular

circumstances of the incident in which defendant spat in the face of another magistrate judge, but the incident does not appear to be in dispute. These considerations do not support a finding of current or immediate dangerousness in defendant's present setting, however.

The only evidence of record supporting the asserted personalization of hostility toward Dr. DeMier, defendant's treating clinician, is defendant's telling Dr. DeMier that he should be prepared to testify in Congress concerning his conduct in this case. Transcript, p.10. In testimony concerning a variety of delusional beliefs held by defendant, Dr. DeMier testified that defendant "continues to harbor beliefs that if he were moved to a County Jail, the FBI would have him killed." Id. at 11-12. Accepting as true the government's version of the facts concerning defendant's conduct with regard to the nurse, which defendant disputes, the conduct amounted to an inappropriate familiarity and even infatuation with the nurse, but the record does not support the conclusion that the conduct was sufficient to put the nurse in fear of violence from defendant.[4] Even if the trend in defendant's thoughts and feelings is as described in Dr. DeMier's testimony and set forth above, and even if, as Dr. DeMier testified, this trend

[4]This is particularly so because no testimony or other information from the nurse herself was submitted for the record.



suggests an increased risk of violence, the risk is not shown to be particularly great or imminent.

The record does not indicate that defendant has posed a danger to himself or others during the period of his institutionalization at the USMC, and the statements and conduct relied upon for a finding of dangerousness do not suggest a threat of violence to the staff.[5] Without more, this Court deems it clearly erroneous to conclude that defendant presents a danger to himself or others sufficient to constitute a compelling state interest outweighing his interest in refusing anti-psychotic medication. The Court's conclusion in this regard is based both on the relative weight of the facts evidenced in the record and what the Court regards as the appropriate legal standard for a finding of dangerousness for the present purpose. The Court here makes explicit its view that the standard of dangerousness pertinent to the determination now before it concerns defendant's dangerousness *at this time* to himself and to those around him *in his institutional context*. The determination here made would not necessarily bear on any finding concerning defendant's

[5]Defendant was transferred to a locked-down cell as a disciplinary measure after he allegedly disregarded the nurse's directive to leave the nurse's station, but has since been returned to an open ward. See Defendant's Update to Supplemental Memorandum [Doc. #405/#264] and Defendant's Second Update to Supplemental Memorandum [Doc. #408/#267].

dangerousness to himself, the public, or any other particular persons if released from an institutional setting.

The claim of dangerousness may also be a post hoc justification. Notice of the institutional medication hearing was given to defendant as early as April 28, 1999, just two weeks after he was found incompetent to stand trial and ordered hospitalized for treatment. See "Notice of Medication Hearing and Advisement of Rights" form included in Addendum Exh. A to Def. Motion Regarding Involuntary Psychiatric Treatment and Medication [Doc. #322/#187]. The April 28, 1999 notice provided to defendant stated that the proposed treatment was "Antipsychotic medication" and that the reason for such treatment was to "Restore competency to stand trial." Id. Dangerousness in his prison setting was not a basis for the administrative decision to forcibly medicate defendant. See "Involuntary Medication Report" included in Addendum Exh. A to Def. Motion Regarding Involuntary Psychiatric Treatment and Medication [Doc. #322/#187]. Instead, the administrative determination was based on the conclusion that anti-psychotic drugs were medically necessary as treatment for defendant's delusional and possibly schizophrenic state.

**Anecdotal Evidence and Ex Parte Materials**

Defendant next contends that officials of the USMC improperly communicated with the magistrate judge by letter on



March 20, 2000, and that the ex parte materials should not have been considered by the magistrate judge to support a finding of dangerousness. This communication consists of a letter from the warden and a "Brief Hospitalization Summary and Request for Extension of Commitment" signed by Dr. DeMier, and appears to be intended as a 120-day report on defendant's hospitalization. Particularly in the context of these proceedings, where the issues concerning anti-psychotic medication are so highly contested, the letter and report should have been served by the USMC on counsel for both parties. In any event, given this Court's conclusion on the issue of dangerousness sufficient to outweigh defendant's liberty interest, the issue need not be further addressed.

The remainder of this point on appeal consists of argument with the sufficiency of the "anecdotal evidence" supporting the opinions of the government's witnesses, treating psychologist Dr. DeMier and consulting psychiatrist Dr. Wolfson, concerning the safety and efficacy of anti-psychotic medications. The Court has earlier expressed its view that the magistrate judge's findings on these issues were adequately supported by the record, and defendant's additional arguments do not disturb that view. To the extent that defendant argues he should have an opportunity to adduce expert testimony challenging DeMier's and Wolfson's conclusions, the argument is entirely unavailing. Defendant has had every opportunity to offer such testimony, at or

in the substantial period of time since the evidentiary hearing held on September 29, 1999.

**Defendant's Trial Rights**

Finally, defendant argues that the forcible administration of anti-psychotic medication will adversely affect his ability to obtain a fair trial by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom and/or by rendering him unable or unwilling to assist counsel. If defendant's medication renders him unable or unwilling to assist counsel, an unfair trial will not occur. A showing that he is unable to assist properly in his defense would result in a continued finding that defendant is not be competent to stand trial.

That the effects of medication might prejudice the defense at trial is a serious issue, but not one which can preclude forcible medication based on the necessarily generalized manner in which the argument must be presented at this time. The issue is, in effect, premature. Until defendant is treated with anti-psychotic medication, its effects on his demeanor cannot reasonably be assessed. In its appellate role, the Court is unpersuaded that the magistrate judge's conclusion in favor of forcible medication is the result of legal or factual error on the issue of medication's impact on defendant's trial rights.



In its capacity as the trial court in this case, the Court here states that if medication is administered and the defense presents argument and evidence concerning its adverse effect on Dr. Sell's ability to defend himself, the Court will give the issue careful consideration. The Court commends to the parties the careful treatment of the trial rights issue by Judge Sullivan of the United States District Court for the District of Columbia in his recent decision in the Weston case, on the basis of a substantially more complete record. United States v. Weston, __ F.Supp.2d ____, 2001 WL 286406 at *15-*19, slip op. at pp.44-57 (D.D.C. March 6, 2001). As Judge Sullivan states:

> The Court will reassess, upon request, its determination regarding the prejudice to Weston's fair trial rights resulting from medication when testimony about the actual, not hypothetical, impact of the medication is available. The Court is confident that any such review will not come too late to prevent impairment of Weston's rights. However, since Weston's reaction to the medication is, at this point, unknown, by proceeding to medicate him, the government risks the possibility of forfeiting its right to bring Weston to trial. Nevertheless, the Court is reasonably confident, based on the persuasive expert testimony, that any prejudice that might arise would occur with ample time for the Court to revisit these issues.
>
> If Weston is medicated and his competency is restored, the Court is willing to take whatever reasonable measures are necessary to ensure that his rights are protected. This may include informing the jurors that Weston is being administered mind-altering medication, that his behavior in their presence is conditioned on drugs being administered to him at the request of the government, and allowing experts and others to testify regarding Weston's unmedicated condition, the effects of the medication on Weston, and the necessity of medication to render Weston competent to stand trial.

Id. at *19, slip op. at 56-57.

**Alternative Basis for Affirmance**

The Court reverses the finding below that defendant's dangerousness is a sufficient basis to override his protected liberty interest in refusing anti-psychotic medication at this time. The Court may, however, affirm the magistrate judge on any ground supported by the record, and the Court concludes there is such an alternate ground in this case. See Marolt v. Alliant Techsystems, Inc., 146 F.3d 617, 621 (8th Cir. 1998). As earlier noted, the magistrate judge concluded that the forcible administration of anti-psychotic medication was supported by the government's strong showing that such drugs "are the only way to render the defendant not dangerous and competent to stand trial on the very serious and violent offenses for which he now stands indicted" and that "[t]here are no other less restrictive means by which this may be accomplished." Memorandum and Order of 8/9/00 [Doc. #367/#227], p. 14 (emphasis added). Under Riggins, the government's inability to "obtain an adjudication of [defendant's] guilt or innocence by using less intrusive means" may be a compelling interest which overrides defendant's liberty interest against taking the drugs.

This Court agrees with the magistrate judge that this is such a case. The interest in adjudication of the charges is less



compelling in cases involving lesser offenses. Here, in addition to 63 counts involving mail fraud, Medicaid fraud and money laundering, defendant is charged with conspiring to kill, and attempting to kill, a witness and an FBI agent. The seriousness of these charges contributes greatly to the compelling strength of the government's interest in adjudicating defendant's guilt. See United States v. Weston, ___ F.Supp.2d ___, 2001 WL 286406 at *14, slip op. at pp.42-43 (D.D.C. March 6, 2001).

In summary, the Court concludes that the record supports three findings: (1) that anti-psychotic drugs are medically appropriate for defendant, (2) that they represent the only viable hope of rendering defendant competent to stand trial, and (3) that the administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges. These findings yield the conclusion that defendant's substantive due process rights do not preclude the involuntary administration of anti-psychotic medication.

Accordingly,

**IT IS HEREBY ORDERED** that defendant's motion to reconsider the magistrate judge's August 21, 2000 order [Doc. #372/#232] is denied.

**IT IS FURTHER ORDERED** that defendant's motion to reconsider and request for discharge from custody or for a hearing pursuant to 18 U.S.C. §4246(e) [Doc. #407/#266] is denied.

**IT IS FURTHER ORDERED** that the magistrate judge's order permitting the involuntary administration of anti-psychotic medication to defendant Charles Sell is stayed for fourteen (14) days to permit defendant to take an appeal from this ruling. Any further stay must be granted by the United States Court of Appeals.

Dated this 4th day of April, 2001.

United States District Judge



UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 01-1862

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|---|---|
| United States of America,<br>Appellee,<br>vs.<br>Charles Thomas Sell,<br>Appellant.<br>---<br>Association of American Physicians & Surgeons, Inc., et al.,<br>Amici on Behalf of Appellant. | Order Denying Petition for Rehearing and for Rehearing En Banc |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Loken, Murphy, Bye, and Riley would grant the petition for rehearing en banc.

Judge McMillian took no part in the consideration of this case.

(5128-010199)

May 7, 2002

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

**IN THE SUPREME COURT OF THE UNITED STATES**

**DR. CHARLES THOMAS SELL, D.D.S.**
**Petitioner,**

**v.**

**THE UNITED STATES OF AMERICA**
**Respondent.**

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

Petitioner Charles Thomas Sell, D.D.S., ("Dr. Sell") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## I. The Petition Should Be Granted To Determine Whether The Government Can Violate An Innocent Individual's Fundamental Right To Bodily Integrity By Injecting Him With Permanently Mind-Altering Psychotropic Drugs Against His Will Solely Because It Believes That There Is A Chance To Medicate The Individual Into Drug-Induced "Competence" For Trial.

This is a case of first impression, inasmuch as it involves a non-dangerous pretrial detainee. Until now, Supreme Court jurisprudence regarding medication of pretrial detainees has only considered the quantum of due process required when the government seeks to medicate a pretrial detainee for the penological interest of maintaining prison safety. See Riggins, 504 U.S. at 127. This Court has never determined whether, consistent with substantive due process, the government can take away an individual's Constitutional right to bodily integrity by forcibly medicating that person, based solely upon the government's assertion that the individual is guilty of a non-violent crime. This



Court's prior jurisprudence in Winston v. Lee, 470 U.S. 753, 767 (1985) and Rochin v. California, 342 U.S. 165, 171-74 (1952), confirms that forced medication of Dr. Sell will violate his Constitutional rights. Under the stark circumstances of this case, this Court should confirm that the right to bodily integrity is a fundamental right, which should not be overridden absent a demonstration of a compelling interest from the government.

Dr. Sell's case presents a unique opportunity to consider these issues for two reasons. First, as determined by the lower courts, Dr. Sell has not demonstrated any violence against himself or others while confined. The sole motive for the government's actions, as noted above, is its desire to prosecute Dr. Sell. Second, because the decision to medicate Dr. Sell was based upon non-violent charges, the government's interest in bringing him to trial cannot be deemed compelling. In a nutshell, this Court needs to address the issues of when an individual's right to be free from unwanted medication ends, and when the government's ability to medicate a non-violent person against their will begins. That line has been unconstitutionally transgressed in the courts below. Also, lower state and federal courts across the nation need guidance on this critical question.

### A. The petition should be granted because the right to bodily integrity is a fundamental right.

Any analysis of an individual's substantive rights under the Constitution begins with the threshold question of whether the challenged state action implicates a fundamental right. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Mills v. Rogers, 457 U.S. 291, 299 (1982) (recognizing that forcible medication of an individual implicates both procedural and substantive rights). Failure to address this question results, necessarily, in a Constitutionally standardless exercise.

Petitioner notes that this Court has never specifically ruled that the right to be free from unwanted medical treatment is a fundamental right. See Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 304-05 (1990) (Brennan , J., dissenting) (stating that majority failed to consider whether right to bodily integrity was fundamental); Riggins, 504 U.S. at 136 (stating Court could not reach question of substantive rights); Washington v. Harper, 494 U.S. 210, 229 (1990) (assuming, without deciding, that right to refuse medication is at least substantial). The determination of whether a fundamental right is implicated, however, remains critical. It is critical because the nature of the right affected by the government's proposed actions is a prerequisite to determining the applicable standard by which the government's actions are judicially reviewed. The District Court and the Court of Appeals in the instant case failed to determine whether Dr. Sell's right to resist forcible medication was fundamental. See App. 6, 44-45. By doing so, their analyses are without the necessary Constitutional bedrock.

In determining whether a fundamental right exists, it is necessary to examine "our Nation's history, legal traditions, and practices." Glucksberg, 521 U.S. at 710. Even before the Constitution's ratification, the common law recognized that the touching of a person without consent or legal justification constituted a battery. See Cruzan, 497 U.S. at 269. The common law and this Court's ruling in other cases demonstrate quite plainly that forcibly medicating a non-violent detainee involves a fundamental right.

This Court has previously ruled that the right to bodily integrity is fundamental. See Glucksberg, 521 U.S. at 720; Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (finding fundamental right for woman to have abortion); Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (recognizing right to use contraceptives is fundamental); Rochin,



342 U.S. at 171-74 (finding government cannot force individual to take an emetic based on suspicion that individual swallowed morphine capsules). A right is fundamental when it involves "the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." See Casey, 505 U.S. at 851. Making a determination about one's own psychology - one's own mental state - and about one's own muscular control are the most important personal decisions an individual can make. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Id.

Acceptance of the Eighth Circuit's decision to narrow the fundamental liberty interest in self-determination of medical issues will adversely affect and overrule, sub silentio, existing law relating to the control of medical decisions concerning pregnant women and by those opposing certain medical treatment on religious and other grounds. Ferguson v. Charleston, 532 U.S. 67, 68 (2001) (refusing to allow drug testing of pregnant women for prosecutorial purpose); Cruzan v. Harmon, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (collecting cases regarding right to refuse medical treatment).

Indeed, in Cruzan, this Court previously acknowledged that the right of an individual to refuse unwanted medical treatment is protected by the Fourteenth Amendment. Cruzan, 497 U.S. at 78-79. Speaking through Chief Justice Rehnquist, this Court reiterated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Id. at 269 (citations omitted). Because "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination," state incursions into the body are deemed repugnant to the interests protected by the Constitution. Id. at 287 (O'Connor, J., concurring); Chandler v. Miller, 520 U.S. 305 (1997) (finding state's requirement that candidates for public office take drug tests is unconstitutional). Not surprisingly, therefore, the trend of modern authority recognizes that an individual has a fundamental right to avoid forced medication. See United States v. Brandon, 158 F.3d 947, 957 (6th Cir. 1998) (recognizing fundamental right in avoiding forcible medication); Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984) (applying analysis similar to strict scrutiny); Doe v. Dyett, No. 84 Civ. 6251-KMW, 1993 WL 378867, *2 (S.D.N.Y. Sept. 24, 1993) (recognizing right to refuse administration of drugs as fundamental); Conservatorship of Wendland, 28 P.3d 151, 154 (Cal. 2001) (determining incompetent adult has fundamental right to refuse treatment); Steele v. Hamilton County Community Mental Health Bd., 736 N.E.2d 10, 15 (Ohio 2000) (finding right to refuse medical treatment is a fundamental right in our country); Steinkruger v. Miller, 612 N.W.2d 591, 596 (S.D. 2000) (holding persons involuntarily committed have a federal Constitutionally protected liberty interest to refuse the administration of psychotropic drugs); In re Conservatorship of Foster, 547 N.W.2d 81, 85 (Minn. 1996) (finding the right to be free from intrusive medical treatment is a fundamental right); In re C.E., 641 N.E.2d 345, 351-52 (Ill. 1994) (same); Rasmussen by Mitchell v. Fleming, 741 P.2d 674, 682 (Ariz. 1987) (same); In re Schuoler, 723 P.2d 1103, 1107-08 (Wash. 1986) (same); Andrews v. Ballard, 498 F. Supp. 1038, 1045-48 (S.D. Tex. 1980) (stating right to refuse treatment encompassed in right to privacy). Accordingly, this Court's jurisprudence suggests the



Constitutional answer to the question of whether the government can forcibly medicate a non-violent detainee against his will: No.

Significantly, the forced administration of psychotropic drugs is more serious than other intrusions into the body. As this Court has previously recognized, "[t]he forcible injection of medication into a nonconsenting person's body . . . represents a substantial interference with that person's liberty and [i]n the case of antipsychotic drugs . . . that interference is particularly severe." Riggins, 504 U.S. at 134 (citations omitted). The forcible medication of Dr. Sell will permanently alter his mind and identity and will substantially infringe his First, Fifth, Sixth and Ninth Amendment rights.[2] "The purpose of the drugs is to alter the chemical balance in a patient's brain. . . . While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." Harper, 494 U.S. at 229. Once such an interest is infringed by the government, it cannot be restored. The right to bodily integrity is a fundamental right.

Moreover, the efficacy of antipsychotic drugs in cases of delusional disorder is uncertain at best. (See, e.g., Transcript of September 29, 1999 Involuntary Medication Hearing at ROA at 526, et seq.) (Judge Stohr acknowledging the disagreement among experts); (ROA at 589). There were three sources of evidence on the question of the medical appropriateness of psychotropic medication for individuals suffering from delusional disorder presented at the hearing before the magistrate judge: the testimony of the Bureau of Prisons witnesses, Drs. DeMier and Wolfson; the affidavit of Dr. Robert

[2] See Bee, 744 F.2d at 1394 and cases cited therein (recognizing decision whether to accept treatment with antipsychotic drugs also falls within privacy interests protected by First Amendment).

Cloninger; and a report from Dr. Daniel Greenstein from the Federal Bureau of Prisons Institution of Metropolitan Correctional Center, a forensic psychologist. While Drs. DeMier and Wolfson, who were advocating medicating Dr. Sell, testified that the use of antipsychotic medication was medically appropriate, Dr. Cloninger's affidavit was clear that "there is no evidence that [antipsychotic medications] are beneficial for patients with delusional disorder." (ROA at 414). The report of Dr. Greenstein stated that delusional disorders do not typically respond to medication or psychotherapy. In fact, the very text relied upon by Drs. DeMier and Wolfson as authoritative, the Comprehensive Textbook of Psychiatry, states that there are no controlled studies reported to support the practice of treating delusional disorder with antipsychotic medication. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 1048 (4th ed.). Ordering involuntary medical treatment presupposes that the treatment is medically appropriate, Riggins, 504 U.S. at 127-28, which is not the case here.

Because Dr. Sell's right to bodily integrity is fundamental, this petition should be granted.

**B. The government must establish a compelling or "extraordinary" interest in trying an individual for a non-violent crime in order to override his fundamental right.**

The government wishes to override Dr. Sell's fundamental right to be free from bodily intrusion under the First, Fifth, and Ninth Amendments and his Sixth Amendment trial rights, so that it can try him for defrauding an insurance company. In United States v. Brandon, the Sixth Circuit determined that the charges brought against the defendant were insufficient for the government to prove it had a compelling interest. 158 F.3d at 961 (discussing charge of sending threatening letter in the mail); see also Bee, 744 F.2d



at 1395 (stating "needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned"); Winston, 470 U.S. at 766-67 (holding government's desire to prosecute defendant did not outweigh defendant's Fourth Amendment rights); see also United States v. Gomes, 289 F.3d 71 (2d Cir. 2002) (labeling government's interest as fundamental). In the instant case, the lower courts labeled the government's interest as "essential," without ever deciding whether the interest was compelling. See United States v. Sell, 282 F.3d 560, 567 (8th Cir. 2002). Because a fundamental right is at stake, the government must demonstrate a compelling interest.

While this Court has never considered whether the government can violate a pretrial detainee's Constitutional right of bodily integrity without asserting any penological objectives, this Court's prior rulings mandate the Constitutional answer.[3] It is undisputed that the government may detain a person suspected of committing a crime prior to an adjudication of guilt. See Gerstein v. Pugh, 420 U.S. 103, 111-14 (1975). However, prior to conviction, an individual committed to pretrial detention has not been adjudged guilty of any crime. While incarcerated, therefore, a pretrial detainee must be presumed to be innocent of alleged, prior criminal conduct. See Bell v. Wolfish, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and

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[3] The district court opinion and the panel opinion afford Dr. Sell, a pretrial non-dangerous detainee, less due process rights than those afforded convicted felons in established case law. A convicted felon cannot be involuntarily medicated unless he is a danger to himself or others within the prison setting and the medication is deemed medically appropriate. Harper, 494 U.S. at 227. By permitting the involuntary medication of a non-dangerous pretrial detainee, the court is fashioning a test that affords an individual presumed innocent with less rights and protections than those of a convicted individual who can only be medicated if dangerous.

its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

In Riggins, this Court states:

> [A]bsent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial.

504 U.S. at 139 (Kennedy, J., concurring) (expressing doubt that the government will be able to make such a showing in most cases).

Petitioner respectfully submits that because the effects of psychotropic drugs on an individual may cause permanent changes in brain chemistry and muscular control, forcibly medicating that individual for the sole purpose of inducing "competence," when the individual has not been found guilty of a crime and still enjoys the presumption of innocence, can only be justified by a government interest of the highest order.

Here, the government's only basis for medicating Dr. Sell is the government's belief that Dr. Sell is guilty of non-violent crimes, involving only economic losses. This interest cannot be compelling enough to overcome Dr. Sell's Constitutional rights.[4] See Brandon, 158 F.3d at 947, 960-61. As noted by the Nevada Supreme Court after remand: "[W]hen I balance the need to bring insane persons to justice against the ignominy of forcing mind-altering drugs down the throats of persons who are presumed to be innocent, I opt in favor of the rights of the individual as against the rights of the State." Riggins v. Nevada, 860 P.2d at 706 (Springer, J., dissenting).

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[4] This is especially so, considering the statute specifically contemplated civil commitment as an alternative remedy. See 18 U.S.C. § 4246. "I should think that any alternative would be less intrusive than toying with an accused's brain chemistry." Riggins v. Nevada, 860 P.2d 705, 707 (Nev. 1993) (Springer, J., dissenting).



Dr. Sell's rights under the common law and under the Constitution were not extinguished after the government charged him with a crime. This Court has recognized the significant Constitutional rights retained by pretrial detainees and has previously only limited those rights when the safety of the pretrial detainee, fellow prisoners or the prison staff was at issue. Riggins, 504 U.S. at 134-35. Indeed, this Court has previously held that prosecutorial motive alone is not enough to violate an individual's Constitutional rights. Winston, 470 U.S. at 766-67 (holding government's desire to prosecute defendant did not outweigh defendant's Fourth Amendment rights); Rochin, 342 U.S. at 171-74 (finding that requiring an individual to ingest an emetic so that police could obtain drugs is unconstitutional).

Although the government possesses an interest in bringing a defendant to trial, not "every charge is sufficient to justify forcible medication of a defendant." See Sell, 282 F.3d at 572 (Bye, J., dissenting) (finding charges against Dr. Sell insufficient to justify forcible medication). While the Eighth Circuit panel also recognized that "[n]ot all charges . . . are sufficient to justify forcible medication of a defendant," it cursorily determined that the charges against Dr. Sell are "serious" and outweighed by the government's essential interest. Sell, 282 F.3d at 568. The Eighth Circuit's one-sentence examination of the nature of the crimes for which Dr. Sell was indicted does not pass Constitutional muster. It does, however, strongly illustrate the need for this Court to explain that the government is required to provide a compelling reason before drugging an individual into "competence." Petitioner also submits that the government cannot present a compelling interest when the defendant is charged with a non-violent crime.

Like the Eighth Circuit, many of the lower courts that have considered forcible medication issues have not analyzed whether the right to bodily integrity is a fundamental right or whether the government's interest in trying the accused is compelling. Failure to conduct this analysis has resulted in a wide range of opinions regarding the types of crimes that justify forcible medication. See Brandon, 158 F.3d at 961 (finding government's interest in prosecuting individual for sending threatening mail is not compelling enough); Bee, 744 F.2d at 1395 (questioning whether the state's interest in trying suspects could ever outweigh the individual's interest in avoiding forcible treatment with antipsychotic drugs); but see Gomes, 289 F.3d at 86 (finding possession of firearm by felon serious enough to warrant forcible medication); Sell, 282 F.3d at 572-73 (stating money laundering and fraud charges justify forcible medication).[5]

The petition must be granted to confirm that the government must establish a compelling interest in trying an individual before forcibly medicating a non-violent detainee.

**C. Even absent a finding of a fundamental right, the forced medication of an accused solely for prosecutorial purposes violates minimum standards of due process.**

Even if this Court determines that the right to bodily integrity is not fundamental, due process still prohibits the conduct advocated by the government here. Due process requires that this Court ascertain whether the government's conduct "offend[s] those

[5] The state cases relating to forcible medication deal primarily with cases involving murder, and thus do not distinguish the state's less compelling interest in prosecuting non-violent crimes. See, e.g., Rickman v. State, 972 S.W.2d 687 (Tenn.Crim.App. 1997); Harrison v. State, 635 So.2d 894 (Miss. 1994); State v. Odiaga, 871 P.2d 801 (Idaho 1994).



canons of decency and fairness which express the notions of justice of English-speaking peoples, even those charged with [criminal] offenses." Rochin, 342 U.S. at 169.

In Rochin, police detectives required the accused to take an emetic because the police suspected that the accused had swallowed two capsules of morphine. 342 U.S. at 166. In finding that this practice violates due process, this Court stated:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172. The government here wants to permanently alter an accused's psychology and possibly alter his muscular control so that it may bring him to trial. This conduct is far more violative than the conduct found unconstitutional in Rochin. Allowing the government's prosecutorial might to extend into physical intrusions into an individual's mind violates the minimum standards of due process. Such a violation cannot be condoned in a free society.

## II. The Petition Should Be Granted To Resolve The Widely Divergent Splits In Opinion Among Federal And State Courts Concerning The Standards To Be Applied When The Government Desires To Forcibly Medicate An Individual Solely For The Purpose Of Attempting To Make Him "Competent" To Stand Trial.

**A. The petition should be granted to resolve a split in the lower federal courts and state courts regarding the proper standard of scrutiny.**

In Riggins v. Nevada, this Court expressly recognized it has "not had occasion to develop substantive standards for judging forced administration of [antipsychotic] drugs," due to deficiencies in the Riggins record. 504 U.S. at 135. In the wake of Riggins are lower federal court and state court decisions proclaiming widely divergent standards of

scrutiny in forced medication cases.[6] This divergence means that pretrial detainees have more Constitutional protection if they are facing trial in the Sixth Circuit than if they are facing trial in the Fourth or Eighth Circuits. See Gomes, 289 F.3d at 82 (adopting heightened scrutiny standard); Sell, 282 F.3d at 567 (adopting essential state interest standard); Brandon, 158 F.3d at 957 (adopting a strict scrutiny-type standard); see also Khiem v. United States, 612 A.2d 160, 166 (D.C. 1992) (requiring overriding justification and medical appropriateness); Bee, 744 F.2d at 1395 (doubting government should ever be able to forcibly medicate individual for prosecutorial purposes alone). Given the recognized importance of an individual's right to be free from forced medication, it is imperative that the Court re-visit the issues that were left unaddressed in Riggins.

The opinions of the federal district courts and state courts also reflect a myriad of opinions regarding the standard to be applied in the forcible medication context. The federal district courts have used standards varying from strict scrutiny, to heightened scrutiny, to a hybrid balancing test requiring a compelling government interest. See United States v. Santonio, 2001 WL 670932, *5 (D. Utah May 3, 2001) (applying strict scrutiny approach), United States v. Sanchez-Hurtado, 90 F.Supp.2d 1049, 1055 (S.D. Cal. 1999) (declining to apply strict scrutiny); Woodland v. Angus, 820 F.Supp. 1497, 1505 (D. Utah 1993) (applying balancing test and finding government's interest in prosecuting a second-degree murder charge not compelling enough to overcome right to be free from forcible medication).

[6] In its Brief to the Eighth Circuit, the government stated that either a strict scrutiny or rational basis test could be applied and noted that "[t]he case law does not supply a clear answer as to which of these standards applies." See Brief of Appellee, page 20.



State court opinions provide an even more divergent view of the Constitutional standard to be applied in these cases. Although several state courts apply a heightened form of scrutiny in determining whether an individual may be forcibly medicated into competence and require that no less intrusive means exist to induce competency, other states only require a minimal showing that the medication will not affect the individual's ability to understand the proceedings against him. See State v. Garcia, 658 A.2d 947, 966-67 (Conn. 1995) (applying balancing test similar to strict scrutiny); Odiaga, 871 P.2d at 805 (using heightened scrutiny); Riggins, 860 P.2d at 705-06 (allowing forcible medication if medically appropriate, necessary to maintain competence and no less intrusive means available); State v. Lover, 707 P.2d 1351, 1353 (Wash. Ct. App. 1985) (requiring compelling state interest and finding such an interest when medication without consent of the pretrial detainee is required to make the individual competent to stand trial); State v. Law, 244 S.E.2d 302, 307 (S.C. 1978) (same); People v. Hardesty, 362 N.W.2d 787, 797 (Mich. Ct. App. 1984) (balancing state's interest in safety and trial continuity with Defendant's interest in presenting probative evidence of insanity through his manner and demeanor on witness stand). At least one state has declared that, under certain conditions, an incompetent individual may waive the right to be tried while competent. State v. Hayes, 389 A.2d 1379, 1381-82 (N.H. 1978) (finding defendant may be forcibly medicated if there are no less intrusive means to maintain competence and holding that defendant may waive his right to be tried while competent if he refuses to take medication).

The lower courts' opinions and the government's briefing in this case highlight the confusion regarding the standard to be applied in forcible medication cases. Contrary

to the express language in Riggins that the majority was not adopting a substantive standard, the Eighth Circuit erroneously concluded that the Riggins Court rejected a strict scrutiny standard of review. See Riggins, 504 U.S. at 136 (stating Court has "no occasion" to adopt a standard of strict scrutiny because of failure of district court to make findings of fact).

After improperly rejecting the strict scrutiny standard adopted by the Sixth Circuit, the District Court below appeared to outline the following test: (1) administration of antipsychotic medication is necessary to serve government's compelling interest in obtaining adjudication; (2) treatment with antipsychotic drugs is medically appropriate; and (3) drugs represent only "hope" of rendering individual competent. See United States v. Sell, No. 4:97CR290-DJS, pg. 17, App. hereto at 45 (E.D. Mo. Apr. 4, 2001) (unpublished decision). In affirming, the Eighth Circuit panel invented a new three-part test in which the government is required to (1) present an essential state interest that outweighs the individual's interest in remaining free from medication; (2) prove that there is no less intrusive way of fulfilling its interest; and (3) prove by clear and convincing evidence that medication is medically appropriate. See Sell, 282 F.3d at 567. The multiple tests applied by the lower courts and apparent confusion about this Court's holding in Riggins result in different treatment of the accused, depending on the jurisdiction in which he happens to be charged. The Court should grant the petition to clarify the applicable standard of scrutiny.

**B. The petition should be granted to resolve a split in the lower federal courts and state courts regarding the proper burden of proof.**

This Court has not decided the issue of the government's burden of proof when it seeks involuntary medication of a pretrial detainee. Lower court and state court decisions



on this issue require various burdens of proof, and many courts do not discuss the government's burden of proof when addressing forced medication issues. See Gomes, 289 F.3d 71, 88 (failing to discuss burden of proof); Brandon, 158 F.3d at 960-61 (requiring proof by clear and convincing evidence); Garcia, 658 A.2d at 967 (requiring proof by clear and convincing evidence); Kheim, 612 A.2d at 172 (adopting medical judgment standard).

Dr. Sell's case illustrates the confusion in the courts regarding the burden of proof to be applied. While the District Court affirmed the magistrate judge's use of a "substantial and very strong showing" standard, the Eighth Circuit required the government to prove, by clear and convincing evidence, that the medication is appropriate. See App. at 24, 45; Sell, 282 F.3d at 567-68. It is unclear what burden of proof the government is required to meet for the remaining two factors in the Eighth Circuit's three-part test.

This Court has mandated that the government prove its case by clear and convincing evidence when "the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." Cruzan, 497 U.S. at 282 (citations omitted). Thus, the Court has required proof by clear and convincing evidence in deportation proceedings, Woodby v. INS, 385 U.S. 276 (1966), in denaturalization proceedings, Schnedierman v. United States, 320 U.S. 118 (1943), and in civil commitment proceedings, Addington v. Texas, 441 U.S. 418 (1979). A defendant's Constitutional right of bodily integrity should be granted equal protection with these important rights. The Court should grant the petition to determine whether the government is required to prove its case by clear and convincing evidence.

### C. The facts presented do not support medication of Dr. Sell under any standard or burden of proof.

Before injecting a person with antipsychotic drugs, the government must establish, at a minimum, that the medication is necessary and appropriate. See Washington v. Harper, 494 U.S. at 222 n.8. In this case, the government was not even required to inform Dr. Sell or the district court which type of drugs or dosage it planned on injecting into him. Certainly, a showing of medical appropriateness requires that the government provide the Court and the defendant with the name of the antipsychotic drug to be administered, so that the defendant can rebut any assertions made by the government. The standardless drugging of pretrial detainees cannot comport with due process.

## III. The Petition Must Be Granted To Resolve The Split Of Authority Regarding Whether The Trial Court Must Consider The Effects The Medication Will Have On Dr. Sell's Trial Rights Before Medication Is Administered.

Trial courts must be required to conduct a Sixth Amendment inquiry regarding the effects of any medication on a detainee's trial rights, prior to ordering that the detainee be involuntarily medicated. See United States v. Weston, 206 F.3d 9, 14 (D.C. Cir. 2000). Under current authority, trial courts in the District of Columbia are required to conduct a premedication review of the effects medication will have on the detainee's Sixth Amendment rights, while trial courts in the Eighth Circuit are not. See id.; Sell, 282 F.3d at 572. This dichotomy in the law results in unequal treatment of individuals entitled to equal treatment under the Constitution.

A criminal defendant's right to present his own defense is guaranteed by the compulsory process clause of the Sixth Amendment and the Fifth Amendment's guarantee that no person in a criminal case can be compelled to be a witness against



himself. See Rock v. Arkansas, 483 U.S. 44 (1987). This right is "one of the rights that are essential to due process of law in a fair adversary process." Id. at 51.

Antipsychotic medication affects the defendant's ability to assist in his defense and, in essence, forces the accused to provide the jury with a coerced confession of his mental state. See Riggins, 504 U.S. at 137, 143 (Kennedy, J., concurring); Rochin, 342 U.S. at 175 (Black, J., concurring) (finding person is compelled to be witness against himself when "incriminating evidence is forcibly taken from him by contrivance of modern science"). In a case where diminished capacity is raised as a defense, the jury must assess their belief about defendant's mental state at the time the crime occurred. "If the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." Hardesty, 362 N.W.2d at 796 . The accused, sitting in the courtroom drugged and listless, becomes an instrument of his own conviction, with his calm and controlled demeanor rebutting his own case without a single word being uttered.

Further, compulsory medication of a defendant makes it easier for the government to rebut the accused's defense of diminished capacity by suppressing the most persuasive evidence of the individual's demeanor at the time the crime occurred. Due process does not allow the government to suppress "evidence favorable to an accused . . . where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963).

After antipsychotic drugs are administered, defendant is deprived of the best evidence of his mental state at the time of the alleged crime – his own demeanor in an

unmedicated state. Postmedication review of an individual's Sixth Amendment rights may come too late to prevent impairment of that right. See Weston, 206 F.3d at 14. "[B]oth the defendant, whose right to present a defense may be infringed by involuntary medication, and the government, whose eventual prosecution of the defendant may be foreclosed because of the infringement, are entitled to premedication resolution of the Sixth Amendment issue." Id.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.



Respectfully submitted,

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